Central Law Journal.

ST. LOUIS, MO., JANUARY 28, 1898.

The decision in Illinois Steel Co. v. Mann, 43 N. E. Rep. 418, before the Supreme Court of Illinois, resulted in a divided court. In that case error was assigned by the appellant in the refusal of the trial court to instruct the jury, that where the master promises to remove a defect that a servant complains of, the servant may rely thereon and continue in the service without assuming the risk of the defect for only such time thereafter as is reasonably sufficient to enable the master to remove the defect. The supreme court in a majority opinion sustain the assignment of error, and three of the members of the court dissent in an opinion by Carter, J., which seems to us to be a complete answer to the contention of the majority. The dissenting judge is quite justified in the assertion that the law is not that the time, and that only, which would be reasonably sufficient for the making of the repairs, is the measure of the time during which the servant may rely upon the master's promise to repair. The reasonable time does not so much relate to the time required to make the repairs as it does to the time the servant is authorized, in the exercise of reason and prudence to rely upon his master's promise. This position is not at all in conflict with the general proposition, as contended for by the majority of the court, and laid down by the authorities, that the servant may continue after the promise to repair in the employment of the master, a reasonable time to enable the master to make the repairs and remove the defect, for it does not follow that the measure of such reasonable time is as stated in the refused instruction. The true rule is, and ought to be, as stated by Judge Carter, that the assumption of the increased risk by the master by his promise to repair, whereby the servant is induced to remain, will continue until he fulfills his promise, or notifies the servant of his inability or unwillingness to do so, or until such a length of time has elapsed as would, under all of the attending circumstances, make it unreasonable for the servant to longer rely upon the promise. Under such a rule the question would be whether the servant, at the time of the accident, relied, or had reasonable grounds to rely, upon the promise of the master to repair, or had himself assumed the increased risk by continuing in the service after he had ceased to rely upon the master's promise.

That the State in the exercise of its police power may provide for the condemnation and destruction of animals afflicted with dangerous infectious or contagious diseases is a well settled proposition of law. But the contention was made in the recent case of Chambers v. Gilbert, 42 S. W. Rep. 630, before the Court of Civil Appeals of Texas, that, as to a statute of that State, which provides for the summary appraisal and destruction of horses afflicted with the glanders and for payment to their owner by the county of their appraised value, the procedure provided does not possess sufficient judicial characteristics to conform to constitutional requirements in this; that there was nothing therein which required as a preliminary to the exercise of such power, a judicial trial of the issue as to the necessity of such summary action and the ascertainment and awarding of damages to result therefrom. The court very properly overruled this contention calling attention to the distinction between the taking or destruction of private property by an individual or corporation, and such taking on the part of the State in its sovereign capacity looking to the general welfare of the public. The latter is the exercise of the sovereign power of police, intended to protect the public from the spread of a disease among domestic animals, which is usually fatal in its effects, and which may extend to people with fatal results. It is the same power that underlies quarantine laws and regulations, and these may go to the extent of authorizing summary destruction of private property when infected with disease germs. Cooley, Const. Lim. 720, citing, Harrison v. City of Baltimore, 1 Gill. 264; Van Wormer v. Albany, 15 Wend. 262; Coe v. Shultz, 47 Barb. 64; Raymond v. Fish, 51 Conn. 80. It is the same power that the government may and does exercise by summary destruction of private property to prevent the spread of fire and general conflagration. Cooley, Const. Lim. 739, and cases cited in

note 1. "In the case before us" says the court "the proceeding for condemnation of animals afflicted with the dangerous and infectious diseases named, their destruction, and the assessment and payment of damages to the owner, does not possess the elements of a judicial trial; but the proceeding is appropriate and effectual in the particular case. It is the exercise of an inherent power in the government, and the manner in which the power is to be exercised violates no principle of our State or federal constitution."

NOTES OF IMPORTANT DECISIONS.

MECHANIC'S LIEN — CONSTRUCTION OF STATUTES—PROPERTY COVERED BY LIEN.—The Supreme Court of the United States in Springer Land Assn. v. Ford, 18 S. C. Rep. 170, adopt the general rule of the State courts regarding the construction of mechanic's lien statutes, holding that such enactments, being remedial, should be so construed as to effectuate their object. Substantial compliance in good faith, with the requirements of the particular law is sufficient, and the test of such compliance is to be found in the statute itself. The court disposed of various technical objections to the sufficiency of the lien in question, holding that statutory requirements had been substantially complied with. Probably the most important point of the decision was that under a statute of New Mexico, giving a lien, for labor and materials used in the construction of ditches, not only on the ditch and the land through which it is constructed, but on so much of the land about the improvement as might be required for its use, "to be determined by the court on rendering judgment," a lien may be obtained, not only upon the ditch and the land through which it runs, but also upon the tract of land for whose irrigation the ditch was constructed. A recent Georgia case discloses that the supreme court of that State look upon mechanic's lien laws in a different light, and favor a less liberal rule of construction. In Seeman v. Schultze, 28 S. E. Rep. 378, the principle is laid down that as statutes allowing liens in favor of certain persons and classes of persons, are in derogation of the common law, they must be strictly construed. Accordingly they hold that under a statute of that State allowing liens in favor of contractors "for work done and materials furnished in building, repairing or improving any real estate of their employers," a lien could not be had for paving the sidewalk in a public street adjacent to the lot of an employer.

RAILROAD COMPANY — RELIEF ASSOCIATION FOR EMPLOYEES — RELEASING LIABILITY—ESTOPPEL. — It is held by the Supreme Court of Illinois in Eckwan v. Chicago, B. & Q. R. Co., 48 N. E. Rep. 496, that the contract of a railroad employee, on becoming a member of the relief department, organized and managed by the railroad company, and largely contributed to by it, under its agreement to make up or guaranty deficits and pay expenses of management, which contract entitles him, in case of disability from injury received at work or from sickness, to a daily payment from the relief fund, in proportion to his contribution, is not against public policy, as an attempted exemption of the company from liability to its employees for its neligence, because providing that the acceptance of benefits for an injury from the relief fund shall operate as a release and satisfaction of any claim against the company on account of the injury; the employee, after the injury, being at liberty to accept the benefit or look to the company for damages. It is also held that an employee of a railroad, after accepting benefits for an accident from the fund of the relief department organized and managed by the railroad company, and largely contributed to by it, under its agreement, cannot claim as *ultra vires* the railroad corporation the organization of the relief department, or the contract of membership therein of the employee, whereby he is to receive benefits in case of disability from sickness or accident, and agrees that, if he accepts benefits for an injury, it shall operate as a release of any claim against the company on account of the injury, and that evidence that a railroad employee was advised on three occasions by the superintendent, who had power to discharge him, to join a relief department of the railroad company, and that he did so, not because he desired to, but because he felt he would stand better with the company, does not show coercion. The court cites the following cases as authority: Maine v. Railroad Co. (Iowa), 70 N. W. Rep. 630; Railroad Co. v. Bell, 62 N. W. Rep. 314, 44 Neb. 44; Donald v. Railway Co. (Iowa), 61 N. W. Rep. 971; Railroad Co. v. Wymore, 58 N. W. Rep. 1120, 40 Neb. 645; Vickers v. Railroad Co., 71 Fed. Rep. 139; Lease v. Pennsylvania Co., 37 N. E. Rep. 423, 10 Ind. App. 47; Ringle v. Railroad Co., 30 Atl. Rep. 492, 164 Pa. St. 529; Shaver v. Pennsylvania Co., 71 Fed. Rep. 931; Otis v. Pennsylvania Co., *Id.*, 136; Johnson v. Railroad Co., 29 Atl. Rep. 854, 163 Pa. St. 127; Spitze v. Railroad Co., 23 Atl. Rep. 307, 75 Md. 162; Fuller v. Association, 10 Atl. Rep. 237, 67 Md. 433; Graft v. Railroad Co. (Pa. Sup.), 8 Atl. Rep. 206; Martin v. Railroad Co., 41 Fed. Rep. 125; State v. Baltimore & O. R. Co., 36 Fed. Rep. 655; Owens v. Railroad Co., 35 Fed. Rep. 715; Griffiths v. Earl of Dudley, 9 Q. B. Div. 357; Clements v. Railroad Co. (1894), 2 Q. B. 482; O'Neil v. Iron Co., 30 N. W. Rep. 688, 63 Mich. 690.

Miller v. Railway Co., 65 Fed. Rep. 305, which seems to be *contra* is distinguished. Magruder, J., dissents from the majority of the court upon the ground that it is not lawful for a railroad company to engage in the insurance business. "Monopolies," he says, "created by the gradual reach-

ing out of railroads into the various departments of business in no way connected with the original purposes of their organization, are dangerous to the liberties of the people."

MONOPOLIES AND RESTRAINT OF TRADE—REASONABLENESS OF RESTRAINT — LIVE STOCK EXCHANGE.—The case of United States v. Hopkins, 82 Fed. Rep. 529, decided by the United States Circuit Court for Kansas, involves interesting and live questions as to monopolies in restraint of trade, the conclusion of the court being that in a suit to restrain alleged violations of the law of July 2, 1890, against trusts and monopolies affecting interstate commerce, the existence of an illegal combination among the defendants is to be determined not alone from what appears on the face of the preamble, rules, and by-laws of their association, but from the entire situation, and the practical working and results of their methods of doing business, as disclosed by the evidence. It appeared that the defendants were members of a voluntary, unincorporated exchange or association at Kansas City, and had agreed to be bound by its articles of association, rules, and by-laws. Their business consisted in receiving, buying, selling, and handling, as commission merchants, live stock received at the Kansas City stock yards from, and sold for shipment to, various States and territories. These stock yards furnish the only available public market for that purpose for an exceedingly large area, including many States and territories. One of the rules of the association fixed a minimum rate of commissions to be charged by members of the association, and prohibited the employment, by any commission firm or corporation, of more than three persons to travel and solicit business, and prohibited the sending of prepaid telegram or telephone messages quoting the markets; and another rule shut out all dealings and business intercourse between members and non-members. Persons attempting to carry on business without joining the exchange were systematically blacklisted and boycotted, and thus effectually prevented from securing or transacting business. It was held that the association was an illegal combination to restrict, monopolize, and control that class of trade and commerce; that the act of congress is aimed against all restraints of interstate commerce, and its purpose is to permit commerce between the States to flow in its natural channels, unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever. The reasonableness of the restrictions in a given case is immaterial that the fact that the place of business of an association is located upon both sides of the line dividing two States is in itself of no material importance in determining whether the business transacted by it is commerce between the States. The shipments of live stock from growers, dealers, and traders in various States and territories to the defendants was solicited by the latter chiefly through personal solicitation of traveling agents, and through advertisements. The course of business to shippers in other States involved frequent loans, secured by chattel mortgages on herds, and frequent drafts drawn by shippers on the defendants, and discounted at their local banks in other States on the strength of bills of shipment attached thereto. Shipments were made to Kansas City and the loans or drafts paid from proceeds of sale, and the balance remitted to the shippers. Sales at Kansas City were made for shipment to markets in other States, as well as for slaughter at packing houses near by. The traffic was of immense proportions, and defendants were active promoters, and frequently interested parties, and gathered in for sale and slaughter millions of cattle, sheep, and hogs; and their rules and regulations covered the entire business, and extended over the whole field of operation. It was held that the defendants were engaged in commerce between the States, and were subject to the provisions of the law of July 2, 1890, against trusts and monopolies; that the live stock shipped to defendants from other States through their solicitation and procurement, to be sold to a large extent for reshipment to other States, or, if the market should be unsatisfactory, for reshipment for sale at markets in other States, does not cease to be the subject of interstate commerce as soon as it reaches Kansas City or is there unloaded, nor until it has been so acted upon that it has become incorporated and mingled with the mass of property in the State, and that live stock shipped from various States to the yards of a stock-yard association in another State, by the solicitation and procurement of the members thereof, to be there sold, or to be reshipped to other States, if the market should be unsatisfactory, does not cease to be a subject of interstate commerce as soon as it reaches such yards and is there unloaded, nor until it has been further acted upon so as to become mingled with the mass of property in the State.

ORAL CRUELTY AS A GROUND OF DIVORCE.

It was once held in this country,[1] but has never been held anywhere else, that a husband might moderately chastise his wife. That court afterwards bravely repudiated that doctrine,[2] and not only is the contrary now universally held, but it is becoming a serious question how far the husband, or the wife, may go with impunity in violence of temper and abusive language. The development of the law in this respect is interesting, and so it has been in regard to corporeal violence. Thus modern decisions have declared that the violence need not be personal. Unmercifully whipping the children in the wife's presence

[1] Bradley v. State, Walker (Miss.), 156.
[2] Harris v. State, 71 Miss. 462.

and in spite of her entreaties is cruelty justifying a separation.[3] So if the husband encourages or suffers his mother to use physical violence toward his wife, the wife may have a divorce.[4] That a husband may not imprison his wife in his house, in the absence of any threat of breach of the peace on her part, was declared a few years ago by the English courts, in the famous Clitheroe-Jackson case, overruling an old decision of Mr. Justice Coleridge, and very much to the disgust of many British husbands, who ventilated their sentiments in the "growlery" of the "*Times*." To illustrate the bounds of delicacy which our courts have reached in the consideration of the treatment of spouses, reference may be made to a case, where a divorce was awarded to a wife because her husband had attempted sexual intercourse with their domestic servant, had been publicly accused by her therefor, and had threatened the wife with expulsion if she would not aid him in inducing the domestic to suppress her complaint.[5] On the other hand, the wife's refusal of sexual intercouse has been held not to be cruelty justifying a divorce.[6] The subjection of the wife to excessive sexual intercourse is, however, a species of corporeal violence which modern decisions strongly disapprove.[7] Under the peculiarly broad statute of Pennsylvania, which allows a divorce to the husband for "cruel and barbarous treatment," rendering "his condition intolerable or life burdensome," it was deemed sufficient for the husband to show that the wife "broke the glass door in his store, and interfered with his customers, that she broke dishes and threw them downstairs, threw hot coffee on the girl, and on two occasions when her step-sons complained of the dinner, she brought in slop and threw it on the table."[8] An examination of the Pennsylvania statute and the decisions under it shows that the husband is regarded with more tenderness than the wife. The husband may have a divorce without having suffered bodily detriment or apprehension of it, but not so of the wife. In one curious case it was held that meanness or parsimony on the part of the husband does not amount to cruelty, and so the wife could not be freed from a husband who required her to get supper on the wedding night, and subsequently compelled her to milk the cows, and to make butter without giving her the proceeds;[9] and in another that the husband was entitled to a divorce for the wife's desertion on account of his compelling her to take care of five cows, and churn (at the same time that she was furnishing milk to a young baby), making her work in the garden, and live on rye flour, refuse potatoes, mackerel, mush and milk, and pickled pork, not allowing her to go to church and treating her family coolly, the husband being a poor young tenant farmer, and the parties having lived together but three months.[10] (It is no wonder that farmers' wives go crazy, and probably if this case had arisen in New Hampshire, the result would have been different, as will be seen in the next paragraph.)

The acme of tenderness has been reached in this country by the New Hampshire court—the most original and innovating in this country—and, strange to say, in behalf of the aggrieved husband, in a decision that a wife's persistence in practicing as a "Christian Science" doctor warrants a divorce for cruelty where the husband is abnormally sensitive.[11] This decision contains a learned review of the cases of divorce on the ground of cruelty, and was rendered under a statute authorizing divorce for "treatment injuring health or endangering reason." Under a narrower statute, and perhaps with less sentimentality, but in a case infinitely more shocking to the sensibilities, and in this instance those of the wife, the Massachusetts court denied a divorce on the ground of cruelty.[12] But courts will not divorce parties simply because they will not live together.[13] In the New Hampshire case above cited, the court observed: "To constitute extreme cruelty, direct bodily injury, actual or threatened, was essential. Threats of personal violence, unless of such a character as to create 'in a mind of ordinary firmness' a reasonable apprehension that they

[3] Bibin v. Bibin, 17 Abb. Pr. 19.
[4] Hutchins v. Hutchins, 93 Va. 68.
[5] Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 125.
[6] Segelbaum v. Segelbaum, 39 Minn. 258; Schoesson v. Schoesson, Wis.
[7] Melvin v. Melvin, 58 N. H. 569, 42 Am. Rep. 605; Mayhew v. Mayhew, 61 Conn. 233, 29 Am. St. Rep. 195.
[8] Heilbron v. Heilbron, 158 Penn. St. 297.
[9] Martin v. Martin, 6 Kulp, 158.
[10] Dietrick's Appeals, 117 Pa. St. 452.
[11] Robinson v. Robinson, 66 N. H. 600, 49 Am. St. Rep. 632.
[12] W——v. W——, 141 Mass. 495, 55 Am. Rep. 491.
[13] McDougall v. McDougall, 5 Wash. 802.

might be executed, were not legal cruelty. To the exceptionally sensitive and timid wife, put in actual and constant fear of life or limb by conduct not calculated to have that effect on a person of ordinary and normal sensibility, the law of divorce afforded no relief. The infliction of mere mental pain, however seriously it might endanger health or endanger reason, was not legal cruelty. A husband might violate all the proprieties and decencies of social life, he might call 'his virtuous wife a strumpet, saying so not to herself alone, but before everybody,' although 'so far as suffering was concerned he had better kick her' (Paterson v. Paterson, 3 H. L. Cases, 308, 313); he might bring prostitutes into his family and seat them at his table—make his house a brothel—and the law, if it would justify the wife in leaving him, afforded her no other remedy." The court further declared that although the conduct complained of "is in itself innocent or even laudable and is pursued from a sense of duty," it is not defensible if it threatens the health or reason of the other party, for "divorce is not punishment of the offender, but relief to the sufferer." By this course of reasoning, the nervous husband might get rid of his wife because she sang or played upon the piano, if he had "no music in himself," and could satisfy the court that such conduct threatened his unmusical reason—a case not inconceivable. The courts long ago laid down the rule that a divorce should not be granted on account of mere bad temper, sallies of passion, or conduct producing annoyance, discontent or disgust. There must be bodily violence or the words or conduct must produce reasonable apprehension of bodily violence, or must affect the physical or mental health. This is the substance of Lord Stowell's celebrated judgment in Evans v. Evans,[14] and in Lockwood v. Lockwood,[15] Dr. Lushington said: "In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb or health is usually inserted as the ground on which the court has proceeded to a separation." "The court has never been driven off this ground. It has always been jealous of the inconvenience of departing from it, and I have seen no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt." So wherever passion or bad temper are alluded to in those courts, they are merely matter of aggravation, as in the case where the husband by his oral violence frightened his wife into fits. This doctrine is reiterated in the very recent English case of Earl Russell, of which I find the following account in a contemporary journal: "The house of lords has stereotyped the narrow definition of cruelty which was used by the majority in the court of appeals in refusing the redress to which Earl Russell was, according to the common sense of mankind, entitled against his wife, says the Solicitors' Journal. According to the rule laid down by Lindley, L. J., 'there must be danger to life, limb, and health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty. Without cruelty in the physical form a man cannot on this ground obtain a decree for separation against his wife or a wife against her husband.' The facts in the present case which have evoked this decision were succinctly stated by the lord chancellor. The Countess Russell 'persistently made accusations against her husband, which, if believed, would drive him from human society; she made them where they would be most likely to be spread abroad; and as both in criminal and civil jurisprudence, people are taken to intend the reasonable consequences of their acts, she must have contemplated that all who encountered her husband would regard him with loathing and horror. She did this, as the jury have found, without any belief in her abominable and disgusting accusations, and with a base motive of extracting better pecuniary terms from the husband she thus vilely slandered.' Yet this, the majority in the court of appeal and the majority in the house of lords have held, does not constitute cruelty of which, when standing by itself, the court can take cognizance in a matrimonial cause. Pollock, B., when directing the jury, took a bolder course. The evidence offered, he directed them, was evidence of cruelty; the jury returned a verdict in accordance with this direction, and Earl Russell obtained at the outset a decree for judicial separation. But in the court of appeal Lindley and Lopes, L. JJ., concurred in the narrow view above

[14] 1 Hag. Const. 35.
[15] 2 Curt. E. C. 281.

stated, and only Rigby, L. J., was in favor of the decree. In the house of lords the opinion of Pollock, B., and Rigby, L. J., was supported by the lord chancellor and by Lords Hobhouse, Ashbourne and Morris; but Lords Watson, Herschell, Macnaghten and Shand were on the other side, and the judgment of Lord Davey at the end converted that side into the majority. Of the whole number of judges engaged in the case six were in favor of Earl Russell and seven against him. In this narrow division of opinion it is worth while to notice that neither of the judges of the divorce division had a chance of lending their assistance." This is a very suggestive decision. One may venture to conjecture that if the parties had been reversed, it would have been to the contrary. At all events it is apparent from the close division of the judges who sat in the case that a relaxation of the old rule may be looked for at no very distant time. In marked contrast to the spirit of that decision is one recently rendered in the city of New York, by that excellent magistrate, Judge Pryor, in the case of Fitzpatrick, of which the following account is from the *New York Times:* "The main ground for granting the decree was the habitual use by the husband of vile epithets toward his wife. Only a few weeks ago it was held by another justice of the supreme court that that was not a ground for a separation, unless accompanied by physical cruel treatment. 'It is not the law of New York,' Justice Pryor said, 'that to such judgment in favor of the wife actual or apprehended physical injury is an indispensable condition. By the terms of the statute, 'cruel and inhuman treatment' justifies a sentence of separation, but that inhumanity may be evinced and cruelty inflicted by verbal outrages as well as by bodily abuse is a fact of human experience and of judicial recognition. Whatever the rule elsewhere and at other times, in this jurisdiction at the present day meek submission and patient resignation is not a wife's sole resource under a brutality that shrinks only from physical violence, but against such misconduct of a husband the courts will afford her commensurate redress. Upon proof therefore of such angered, contumelious, and degrading reproaches by the husband, applied maliciously and without provocation, as make his presence an intolerable grievance, destructive of the happiness that is the end of the matrimonial association, a wife is entitled, without sacrifice of her right to support, to be relieved of the humiliating treatment and companionship.'" (A contemporary journal invites comparison of this with the Russell case, mistakenly supposing the latter to be that of the Lord Chief Justice.)

The New York decision is rendered under a statute which allows only a separation for cruelty, and herein it is distinguishable from decisions which make cruelty a cause for absolute divorce. In fact, the statutes differ considerably in the States as to what constitutes cruelty warranting a dissolution of the marriage. So "ungovernable temper," "habitual indulgence in violent and ungovernable temper," "cruel treatment, outrages or excesses such as render their living together insupportable," "such indignities as render life burdensome," "intolerable severity," "gross misbehavior," inability to "live in peace and union," "such conduct as renders it unsafe or improper for her to live with him," "settled aversion which tends to destroy all peace and happiness," "cruelty," "extreme cruelty of treatment," "cruel and inhuman treatment," "cruel and barbarous treatment," to say nothing of the famous (or infamous) "omnibus clause" which enables the court to dissolve the marriage for any cause that they many deem sufficient, are statutory phrases of great variety and elasticity, and explain in some measure the differences in adjudication. A few States, it will be remembered, have a system of limited divorce or separation, under which a stricter view of the ethics of marital conduct is reasonably taken. The common American doctrine undoubtedly formerly was, and probably still is, that no divorce may be awarded for mere oral abuse unless it has caused, or there is a reasonable apprehension that it may cause, injury to life, limb or health, but that physical injury created by mental apprehension so caused is sufficient, and this is a question of fact. This doctrine is general and well settled, and may be found in nearly all the cases referred to in this article, so that it would answer no useful purpose to cite many of them specially, as my object is to discover whether there has been any considerable relaxation of it.[18]

[16] Jones v. Jones, 62 N. H. 463; Bailey v. Bailey, 97

There is a line of decisions in which oral abuse, taken in connection with physical violence toward wife or children or expulsion or failure to provide, has been deemed an influential factor, although the violence was not of a character to endanger life.[17] Some cases of late seem to go so far as to adjudge that oral abuse, without physical violence or any injury to health, may be a sufficient cause for absolute divorce. "Cruel treatment may exist from conduct other than blows. Mental anguish, wounded feelings constantly aggravated by repeated insults and neglect, are as bad as actual bruises of the person; and that which produces the one is not more cruel than that which causes the other."[18] "Extreme cruelty may consist of words only, and of personal treatment and conduct short of acts of personal or physical violence."[19] So the wife was freed from the marriage because her husband "treated her coldly and with extreme stinginess," and "brutally neglected her while in premature labor and harshly upbraided her for the noise she made while suffering pain during her illness."[20] In another case[21] the court observe: "Cruel treatment, or cruelty, in the broad and unrestricted sense in which it is used in our statute, is any act intended to torment, vex or afflict, or which actually afflicts or torments without necessity; or any act of inhumanity, wrong, oppression or injustice; for these, or any of them, is the common understanding of the term." But in all these cases it is not difficult to see that the acts complained of would naturally induce physical injury. In the last case, for example, although stress is laid on the husband's coldness, indifference and neglect, his refusal to let her attend her own church, and his limiting her, although he was rich, to one pair of shoes and two calico dresses a year, his refusal to punish his slaves for insolence, and his insubordination to her, and his making a will cutting her off with five dollars, yet there was also proof that he expelled her in a state of pregnancy from his house and accused her of infidelity. These two last acts, the court admit, would be a good cause for divorce even in the ecclesiastical courts, and "exposed her to bodily as well as mental suffering," and so the sentimental and rhetorical remarks on the other matters were *obiter*, although they do credit to the gallantry of the court. (In California the statute grants divorce for "grievous bodily suffering," and at first that court held that this implied a necessity for corporeal injury, but this has recently been overruled.) In Pennsylvania, however, under a statute authorizing a divorce to the husband "where the wife shall have by cruel and barbarous treatment rendered the condition of the husband intolerable or life burdensome," it has been held that it is not essential, to warrant the divorce, to show any injury or danger of injury to health.[22] The bad conduct in this case was oral, consisting in vile and abusive language, scolding, fault finding, and accusations of unchastity. But other courts have denied the remedy for mere oral abuse unaccompanied by any proof of physical injury or reasonable apprehension of such injury, as where the husband called the wife "old goat," "old cow," made fun of her long nose, etc., but the wife gave him about as bad as he sent.[23] So in Wood v. Wood,[24] divorce was denied although on the part of the husband there was an absence of common attention; a non-observance of the most ordinary courtesies; heartless neglect; and unfeeling indifference to the comfort and relief of his wife in sickness; a disregard of the obligation of marital vows; holding the wife in the capacity of a menial servant, when able to relieve her from such service, instead of an equal and companion in life; viewing the marriage relation as merely physical and sexual; and a

Mass. 373; Wolff v. Wolff, 102 Cal. 433; Fizzette v. Fizzette, 146 Ill. 328.

[17] Whitacre v. Whitacre, 64 Mich. 232; Myers v. Myers, 83 Va. 806; Sylvis v. Sylvis, 11 Colo. 319 (violent wife); Crichton v. Crichton (not "The Admirable"), 73 Wis. 59; Hacker v. Hacker, 90 Wis. 325; Mason v. Mason, 131 Pa. St. 161; Douglass v. Douglass, 81 Iowa, 258; Day v. Day, 56 N. H. 316; Farnham v. Farnham, 73 Ill. 497; Wolff v. Wolff, 102 Cal. 433; Doolittle v. Doolittle, 78 Iowa, 691, 6 L. R. A. 187.

[18] Glass v. Wynn, 76 Ga. 319. Also see Myers v. Myers, 83 Ga. 806; Rosenfeld v. Rosenfeld, 21 Colo. 16; Hoyt v. Hoyt, 56 Mich. 50; Myrick v. Myrick, 67 Ga. 776.

[19] Rosenfeld v. Rosenfeld, 21 Colo. 16.

[20] Hoyt v. Hoyt, 56 Mich. 50.

[21] Myrick v. Myrick, 67 Ga. 776.

[22] Barnsdall v. Barnsdall, 171 Pa. St. 625.

[23] Minde v. Minde, 65 Mich. 633; Wood v. Wood, 80 Ala. 254; Douglass v. Douglass, 81 Iowa, 263 (*obiter*); Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487; Marks v. Marks, 56 Minn. 264, 45 Am. St. Rep. 466; Poor v. Poor, 8 N. H. 307, 29 Am. Dec. 664 (wife not "a meek and quiet spirit," but "often provoking and vexatious."

[24] 80 Ala. 255.

want of affection for his own offspring," the court holding that this did not raise "reasonable apprehension of danger to life or health." So it is said in Marks v. Marks:[25] "Such a course of ill-treatment, long continued, where the acts of the husband are studied and malicious, and the wife is sensitive, may be cruel and inhuman treatment, if it has a serious effect on her health, or causes her great mental suffering, but the effect on her must be of a serious character." That seems a very merciful decision where the Maryland court adjudge that outbreaks of passion and violence on the part of the wife when she is uncontrollably under the influence of drink will not justify a divorce.[26] It reminds one of General Spraker, an early Dutch settler in the Mohawk Valley, who ran a church on his own account, and discharged one of his dominies, because, as he said, "he had one very bad fault for a dominie, he was very cross when he was drunk." When the oral abuse consists in false and repeated accusations of unchastity of the wife, a separation or divorce has frequently been awarded to the aggrieved party.[27] But this has been denied to an aggrieved husband,[28] and to the wife when she was not as Cæsar's wife must be.[29] A few courts have gone so far as to regard a single false accusation of unchastity of the wife as sufficient to warrant a divorce, especially where it can be seen that the husband is likely to repeat the offense.[30] But on the other hand this has been denied even when the abusive words were coupled with an act of corporeal violence.[31] In Crow v. Crow,[32] the court forcibly observed: "To charge a woman, in the presence and hearing of others, with the commission of the crime of adultery, is to render her subject to the gross insults of lustful men who may hear and believe the rumor, which whether true or false tends to rob her of her good name, alienate her friends and acquaintances, and deprive her of their society and companionship." When the charge is made by others "her life must be rendered burdensome, but how much greater must be the degree of misery suffered by her when such a charge is falsely made by one who has solemnly promised to love, cherish and protect her." It may well be doubted, it seems to me, whether it is in accordance with public policy to grant divorce for a single accusation of this kind, without allowing any *locus penitentiæ* to the angry husband. It would be superfluous, except for amusement, to consider those "wild cat" cases disclosed in Carroll D. Wright's official report, in which divorces were granted to a wife because the husband kept a saloon and kept her awake by talking, or because he accused the wife's sister of stealing, or quoted Scripture about wives obeying their husbands or would not speak to his wife for months at a time (which seems the opposite of oral cruelty), or importuned her to deed him her property, or in which the husband got a divorce because the wife importuned him to deed her his property, or "evinced a hasty temper," or vowed she would drown herself rather than have another child. These may be regarded as the insanities of judicial decision, and should be marked "not to be reported"—and probably were—and to such abominable laxity in construing the term "cruelty" and its statutory equivalents is in a large measure due the disgraceful and humiliating fact that in this country in the last thirty years half a million divorces have been granted. Judges who pronounce such decisions are *particeps criminis* and *communes hostes*.

Buffalo, N. Y. IRVING BROWNE.

[25] 56 Minn. 264, 45 Am. St. Rep. 466.

[26] Shutt v. Shutt, 71 Md. 193, 17 Am. St. Rep. 519.

[27] Strauss v. Strauss, 67 Hun, 491 (separation); Wagner v. Wagner, 36 Minn. 239; Kennedy v. Kennedy, 73 N. Y. 369; Pinkard v. Pinkard, 14 Tex. 356; 65 Am. Dec. 129; Powelson v. Powelson, 22 Cal. 358; Carpenter v. Carpenter, 30 Kan. 712; Palmer v. Palmer, 45 Mich. 150; Williams v. Williams, 67 Tex. 198; Eggerth v. Eggerth, 15 Oreg. 626; Clinton v. Clinton, 60 Mo. App. 296; and English cases cited in note, 40 Am. Rep. 463.

[28] McAllister v. McAllister, 71 Tex. 695.

[29] Evans v. Evans, 82 Iowa, 462; Coulthard v. Coulthard, 91 *Ibid.* 742.

[30] Bahn v. Bahn, 62 Tex. 518, 50 Am. Rep. 539; Avery v. Avery, 33 Kan. 1, 52 Am. Rep. 523; Friend v. Friend, 53 Mich. 543; Kelly v. Kelly, 18 Nev. 49, 51 Am. Rep. 732; Crow v. Crow, 29 Oreg. 392; Palmer v. Palmer, 45 Mich. 150, 40 Am. Rep. 461, and note, 468.

[31] Fritz v. Fritz, 138 Ill. 436, 32 Am. St. Rep. 156; Nye's Appeal, 126 Pa. St. 341, 12 Am. St. Rep. 873; Marks v. Marks, 56 Minn. 264, 45 Am. St. Rep. 466.

[32] 29 Oreg. 392.

DIVORCE—CONDONATION—CRUELTY—RECRIMINATION.

DUBERSTEIN v. DUBERSTEIN.

Supreme Court of Illinois, December 22, 1897.

1. Condonation on the part of the wife is not so strict a bar against her, as against the husband, and

the converse rule is true, that condonation is a stricter rule against the husband than against the wife.

2. As to an act of cruelty committed by the wife against the husband subsequent to condonation, it must be proven by clear evidence.

3. A repetition of the same injury does away with condonation, and revives the former injury; hence, all condonation is conditional, involving an express or implied agreement that the forgiving party does so only on condition that the party forgiven will not repeat the offense.

4. A party charged with cruelty, may justify himself or herself, by showing that the other party is equally to blame; and as the law is for the relief of the oppressed party, the court will not interfere in quarrels where both parties commit reciprocal excesses.

5. While the authorities differ, whether the defendant in answer to one ground of divorce, can set up another in defense, or whether any cause for divorce is a good defense against any other, the Illinois rule is shown in Bast v. Bast, 82 Ill. 584.

MAGRUDER, J.: The appellate court, in its opinion in this case, summarizes the acts of cruelty, charged by the appellee against the appellant, as follows:

"1. The throwing of a chair in January, 1886, on Mr. Duberstein, inflicting a serious injury on his side.

"2. The drawing of a knife upon him in the fall of 1888 without injury to him.

"3. The throwing of an iron stove cover at him, striking his head and inflicting serious injury in April, 1891.

"4. Use of violent and abusive language and threats in August, 1894, and at other times previous thereto.

"5. Striking Mr. Duberstein with an ornament stone in April, 1895, and throwing chairs and cuspidor at him, inflicting two wounds on his head; that he was under the care of a physician and compelled to undergo an operation."

From an examination of the pleadings and the evidence, we are inclined to regard the summary thus made by the appellate court as correct. So far as the fourth charge, as to the use of violent and abusive language is concerned, it may be said that this charge constitutes no sufficient ground for a divorce. As to the first three acts of cruelty, charged by the appellee against the appellant, as specified in the above summary, the evidence shows that they were all condoned by the appellee.

The appellee makes the following statement in his testimony:

"Commencing from January now, we lived for about four or five weeks very happily, and I brought all my money home. * * * It was 1895, instead of 1894, when we lived happily for four or five weeks; in January or February."

For reasons found in the conjugal relation, and in view of the difference in the duties respectively required of the husband and wife in the domestic establishment, a less stringent rule is held against her than against him, so far as inferences of condonation are concerned from the overt acts of the parties respectively. The authorities hold that condonation is not so strict a bar against a wife as against a husband, inasmuch as she may find it difficult to quit the common domicile, and often submits through necessity. Hence, condonation on the part of the wife is not pressed with the same vigor as condonation on the part of the husband. Phillips v. Phillips, 1 Ill. App. 245; Home v. Home, 72 N. Car. 530; Reese v. Reese, 23 Ala. 485; Davies v. Davies, 55 Barb. 130; Sterling v. Sterling, 12 Ga. 201. The converse of the rule must be true, that condonation is a stricter bar against the husband as against his wife, than it is against the wife as against her husband; and condonation by the husband will much more readily be relied upon as a defense in favor of the wife where she repeats the offense condoned. The testimony here establishes a condonation by the appellee of the acts of cruelty charged against his wife, which are alleged to have taken place prior to April, 1895. In view of such condonation we do not deem it necessary to discuss the acts of cruelty taking place before April, 1895. The testimony in support of them comes principally from relatives and employees of the appellee. They are denied by the appellant, both in her answer and in her testimony; and many circumstances, unnecessary to be here dilated upon, tend to support her denial. But whether such prior charges of cruelty against her are sustained or not, it is virtually conceded on the part of the appellee, that the testimony as to what occurred in January and February, 1895, amounted to a condonation of such offenses, unless the right to rely upon them was revived by the alleged conduct of appellant in April, 1895.

Appellee insists that in April, 1895, appellant was guilty of such acts of cruelty toward him as to do away with the effect of the previous condonation. The general rule is, that a repetition of the same injury does away with the condonation and revives the former injury. If, after forgiveness of the offense charged, the defendant has given to the complainant no just cause for complaint, the forgiveness will be a good defense, but if the condition is broken, it will be no defense; hence it has been said that all condonation is in a sense conditional, and involves an express or implied agreement, that the party, who forgives the other, does so only on the condition that the party forgiven will not repeat the offense. 5 Am. & Eng. Enc. of Law, p. 821, n. 1, 823; Johnson v. Johnson, 4 Paige Ch. 460; Yates v. Yates, 2 Beasley, 281; Kennedy v. Kennedy, 87 Ill. 250.

The question then arises, whether the act of cruelty charged by the appellee as having taken place in April, 1895, had the effect of reviving the acts of cruelty which occurred before that date, and which was condoned in January and February, 1895, so as to justify the appellee in relying upon such previous acts of cruelty in support of the charge made in his bill.

Appellee swears, fixing the date at one time in

the early part of April, 1895, and at another time in the middle of April, 1895, that one Sunday he came home about noon and went to bed; that his wife looked under his pillow for his vest, as usual (to get his money); that he pushed her away; that he pulled the cover over his head; that she took a stone ornament, called a sea-shell, which was in the room; that there was a blow on his head; that she made two holes in the back of his head; that he commenced to cry and halloa for help; that he stayed in the house a little while the next morning and then went for a doctor; that he lived with her a week after that, but did not after that occupy the same bed with her or cohabit with her. Appellant swears, in regard to this transaction, that upon the occasion referred to, in April, 1895, appellee came home very drunk, that he climbed up the stairs; that she heard somebody fall down, and opened the door and saw it was her husband; that she took him by the hand and led him up and put him in bed and he fell asleep; that it was three o'clock in the afternoon; that she went back to see how he was getting along, and found him awake in bed; that he gave her a slap in the face; that the blood ran from her teeth; that she saw he was drunk and paid no attention; that she told him to rest and sleep, that he did not know what he was doing; that he ran out from the bed and beat her about the shoulders, and tore her wrapper, and began to drag her about by the hair, and threw her on the floor; that she ran into the kitchen; that he ran after her and fell; that, when she saw him fall, she came back; that he fell in the middle of the room, between the parlor stove and the bureau, a very narrow place, and an ornament was there; that she tried to lift him up and seat him on the chair; that his head was bleeding; that she got so frightened that she ran to the landlady and told her that her husband had fallen down and hurt his head, and that she was afraid he would faint; that she told the landlady he was drunk; that she found the daughters of the landlady, and asked the older one to go for the doctor, but the doctor was not at home; that he lay down in bed again and went to sleep; that she remained in the house that night. She also says: "I never struck him with the ornament that was here yesterday. I never said a bad word to him. I loved him. I never beat him; he used to beat me when drunk."

It is sought to support the testimony of the appellee in regard to this occurrence by that of one of his employees named Rubinstein, who had worked for him, he being a tailor. But this witness did not see him until the Friday night after the Sunday on which the occurrence took place; and to this witness the appellee stated at that time, that "he got hurt by a gas fixture." It is also sought to sustain the testimony of the appellee by that of one of the daughters of the landlady, who came up to the apartment soon after the appellee was hurt. This witness states, that she found the appellant sitting on the stairs, with her hair down, and that she found the appellee in the sitting room with his coat off and blood on his face; that appellant went up and got her things on and said she would go for the doctor, but changed her mind and did not go. After an examination of all the testimony in regard to the occurrence which took place in April, 1895, we are unable to say that the circumstances, which tend to substantiate the account of it given by the appellee, are entitled to any more weight than those which tend to substantiate the account of it given by the appellant.

It is now a settled rule in this State, that, where the husband asks for a divorce from his wife upon the ground of extreme and repeated cruelty, he must make out a clear case, and it is not sufficient for him to show slight acts of violence on her part toward him, so long as there is no reason to suppose that he cannot protect himself by a proper exercise of his marital powers. De La Hay v. De La Hay, 21 Ill. 252; Fritz v. Fritz, 138 Ill. 436; Aurand v. Aurand, 157 Ill. 321. We are unable to say, that the appellee has established the acts of cruelty alleged to have taken place in April, 1895, with such clearness, as to justify us in holding that they operated to annul and set aside his condonation of such previous acts of cruelty on her part as may have occurred, or to revive such acts of cruelty as legitimate grounds for a divorce. In addition to all this, the appellant swears with great positiveness, that the appellee did not leave her until June, 1895, and that, on November 7, 1895, he came home at one o'clock in the morning and was kind to her, and stayed at home; that they then cohabited together; that he stayed the whole night and went away at six o'clock the next morning, going away stealthily. He denies that he visited her on November 7, 1895; her oath stands over against his in regard to this matter. We are unable to find any evidence, tending to contradict her statement, or to sustain his, in regard to this visit of November 7, 1895. The testimony of the landlady confirms the appellant, so far as to state that the appellee was in her apartment in June, 1895. If the testimony of appellant is true, then the cohabitation, which took place on November 7, 1895, cannot be regarded otherwise than as a condonation of the act of cruelty, which is alleged to have been committed in April, 1895. The appellant testifies with great positiveness as to acts of cruelty committed previous to April, 1895, by her husband against her. She states that he would leave her for a month or more at a time without money; that he would come home drunk; that he would beat her; that he would drag her around the room by her hair, etc. She states that on October 27, 1893, he gave her a kick with his foot, and took her by the hair, and dragged her to the door of his shop and told her to go away; that she lay there, until the landlady came down, and found her lying at the door, and told her to go home, which she was unable to do because of being weak and exhausted; that appellee said upon that occasion: "Let her lay; if she dies, I will get rid of her quicker;" that the landlady took

her home; that she was unable to get upstairs; that the landlady called another woman and they took her upstairs; that Dr. Henn was then called and treated her one week. The appellant is contradicted in regard to this occurrence in October, 1893, by two men who were working for appellee. But it appears from the testimony of Dr. Henn that, on October 27, 1893, he was called to attend the appellant, who lived just across the street from him; that, when he went to see her, she was quite excited; that she was lying on the bed in her nightgown; that she was bruised in several parts of the body, sides, limbs, and on her arms; that some of these bruises were small, and some were large; that the large ones were on the leg; that he called there every day in the week.

But there is testimony which sustains the appellant in her statement that her husband was guilty of cruelty toward her.

(The court here recites the testimony of Lena Schneider, Mrs. Bauer, Mrs. Shutan, Mamie Sudowich, Herman Bergawitch, Jennie Karp, Sarah Muscovitsch, B. Ruberzik, Moritz Levitz, and Henry L. Marks.)

In view of the testimony thus introduced by the appellant, some observations upon the defenses, known in the books as justifiable conduct and recrimination, are peculiarly appropriate. It is manifest that, even if appellant was guilty of acts of cruelty toward appellee, appellee was guilty of acts of cruelty toward appellant. A party charged with cruelty may justify himself or herself by showing that the other party was equally to blame. * * * The law is for the relief of the oppressed party, and the courts will not interfere in quarrels where both parties commit reciprocal excesses and outrages." 5 Am. & Eng. Enc. of Law, p. 796; Durand v. Durand, 4 Mart. 174. We think that, if appellant was to blame, appellee was equally to blame.

Recrimination is defined to be "A countercharge by the defendant of a cause of divorce against the complainant." 5 Am. & Eng. Enc. of Law, 824. Many authorities lay down the rule that, when each party has a cause for divorce, neither can obtain relief. The authorities differ as to whether, when the complainant alleges one cause as a ground for divorce, the defendant can set up another cause in defense. Some of the authorities hold, that any cause for divorce is generally a good defense against any other, even though they be cause for different kinds of divorce. But other authorities hold, that the offense set up in defense must be of the same statutory kind as the offense charged in the bill. In the case of Bast v. Bast, 82 Ill. 584, we said: "The grounds alleged for reversing the decree in this case are that the decree is not sustained by the evidence, and that appellee himself had deserted his wife, giving to her the right to claim a divorce from him. We do not think his desertion can exonerate the wife from the more serious charge of adultery. Neither that, nor drunkenness, nor cruelty, will, under our statute, constitute a sufficient recriminating defense to a charge of adultery. Had appellee been guilty of a like offense, he could not claim a divorce." In the case at bar, appellee was guilty of a like offense, to-wit: cruelty, with that with which he charges appellant. In Beck v. Beck, 63 Tex. 34, which was a suit for divorce brought on the ground of cruel treatment, where the evidence showed that both the wife and her husband had frequent altercations, and that, at least, on one certain occasion, one party gained the ascendency and beat and bruised the other severely, it was held, that there was such recrimination on the part of the complainant as would prevent the granting of a divorce in accordance with the prayer of the bill. Divorce is a remedy provided for an innocent party (5 Am. & Eng. Enc. of Law, 825, n. 6), so that, when each party has committed a cause for divorce, the causes being of the same statutory character, neither can complain of the other. Here it cannot be said, in view of the testimony already quoted, that the appellant is an innocent party.

He alleges in his bill that "during the time he lived with appellant he conducted himself as a kind and indulgent husband." This allegation is not sustained by the proofs. Rivet v. Rivet, 39 Ala. 348; Smith v. Smith, 4 Paige Ch. 432; Pastoiel v. Pastoiel, 6 Mass. 276. In discussing this subject, Mr. Bishop in his work on Marriage, Divorce and Separation, says: "There is a rule which forbids redress to one for an injury done him by another if himself in the wrong about the same thing whereof he complains." This doctrine is applicable in the divorce law. 2 Bish. on M., D. & S., secs. 344, 346, 365-367, 381, 409. It is peculiarly applicable to the facts of this case. If equal credence be given to the testimony of the appellee and the testimony of appellant—and we see no reason why the testimony on one side is not entitled to as much credit as the testimony on the other side—it must be said, that the parties here are *in pari delicto*, and therefore must be left to themselves. Horne v. Horne, 72 N. Car. 530.

The judgment of the appellate court and the decree of the circuit court are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

NOTE.—*Condonation in Divorce.*—Condonation is the forgiveness by the complainant of the act complained of (Quarles v. Quarles, 19 Ala. 363; Trimbull v. Trimbull, 23 Ark. 615; Johns v. Johns, 29 Ga. 718; Philips v. Philips, 4 Blackf. [Ind.] 131; Burns v. Burns, 60 Ind. 259; Gardner v. Gardner, 2 Gray [Mass.], 434; Harper v. Harper, 29 Mo. 301; Quincy v. Quincy, 10 N. H. 272; Stevens v. Stevens, 14 N. J. Eq. 374; Marsh v. Marsh, 13 N. J. Eq. 281; Pitts v. Pitts, 52 N. Y. 593; Philips v. Philips, 27 Wis. 252), on conditions performed by the defendant. Durant v. Durant, 1 Hagg. Ecc. 733. Condonation thus involves an act on the part of both parties. Dent v. Dent, 4 Swab. & T. 105; Turner v. Turner, 44 Ala. 437; Osmore v. Osmore, 41 Ga. 46; Kennedy v. Kennedy, 87 Ill. 250; Sullivan v. Sullivan, 34 Ind. 368; Verhalf v. Honevenlengen, 21 Iowa, 429; Sewall v. Sewall, 122 Mass. 156;

Robbins v. Robbins, 108 Mass. 150; Armstrong v. Armstrong, 32 Miss. 279; Langdon v. Langdon, 25 Vt. 678; Quarles v. Quarles, 19 Ala. 363; Armstrong v. Armstrong, 27 Ind. 186; Johns v. Johns, 29 Ga. 718. The forgiveness may be express or implied. It must be accepted. It must be freely given. It must be given with knowledge of the delinquent's guilt. It may be express (Quincy v. Quincy, 10 N. H. 272; Turner v. Turner, 44 Ala. 237), as "I forgive you" (Turner v. Turner, *supra*), or implied, as from sexual intercourse after knowledge of the offense. Quarles v. Quarles, *supra;* Trimbull v. Trimbull, *supra;* Burns v. Burns, *supra;* Harper v. Harper, 29 Mo. 301; Thomas v. Thomas, 2 Caldw. (Tenn.) 123; Buckholz v. Buckholz, 24 Ga. 238; Twyman v. Twyman, 27 Mo. 383; Davies v. Davies, 55 Barb. 130; Quincy v. Quincy, 10 N. H. 272; Marsh v. Marsh, 13 N. J. Eq. 281. The forgiveness must be rejected, for a mere rejected proposal to forgive or willingness to would not suffice. There must be an acceptance on the part of the delinquent showing repentance, and an intention to "sin no more." Betz v. Betz, 2 Rob. (N. Y.) 694; Johns v. Johns, 29 Ga. 718; Quarles v. Quarles, 19 Ala. 363; Armstrong v. Armstrong, 27 Ind. 186. The forgiveness must be freely given, and not obtained by force or fraud, and misstatements or false promises (Farnham v. Farnham, 73 Ill 497; Betz v. Betz, *supra*), and this is why a wife's forgiveness is less readily presumed than a husband. What with him might mean forgiveness, with her might show only patient endurance. Reese v. Reese, 23 Ala. 785; Horne v. Horne, 72 N. Car. 531; Turner v. Turner, 44 Ala. 437; Delliber v. Delliber, 9 Conn. 233; Bowie v. Bowie, 3 Md. Ch. 51; Hollister v. Hollister, 6 Pa. St. 439; Wright v. Wright, 6 Tex. 3. The forgiveness must be given advisedly. The conduct alleged to have been forgiven must have been known. Phillips v. Phillips, 1 Ill. App. 245; Odom v. Odom, 36 Ga. 286; Burns v. Burns, 60 Ind. 259; Rogers v. Rogers, 122 Mass. 423; Magathlin v. Magathlin, 138 Mass. 299. Suspicion without proof is not sufficient knowledge (Quincy v. Quincy, 10 N. H. 272), and forgiveness of one act is not forgiveness of others not known or suspected. Rogers v. Rogers, 122 Mass. 423. The forgiveness is always conditional. The condition may be express (Farnham v. Farnham, 73 Ill. 497; Lassiter v. Lassiter, 92 N. Car. 129), or it may be implied, for the law always implied the condition that there shall be no just cause for complaint in the future, or, as commonly stated, that the delinquent shall treat the condoning party with conjugal kindness. As a defense, condonation is applicable to a charge of adultery and of cruelty (Gardner v. Gardner, 2 Gray [Mass.], 434; Sullivan v. Sullivan, 34 Ind. 368; Phillips v. Phillips, 27 Wis. 252), and in principle to other causes for divorce. The allegation of the defense of condonation, like that of other defenses, should properly be made by the defendant (Warner v. Warner, 31 N. J. Eq. 225), though in some stages it must be negatived in the bill of complaint. The proof of condonation need not be as strict as the proof of connivance, as the former is not a base and criminal, but often a generous and noble act. Still it must be clearly shown that the complainant freely forgave the offense and knew of the offense. Such knowledge may be circumstantially proved. Magathlin v. Magathlin, 138 Mass. 299.

Recent Decisions on Condonation.—Cruelty in the marriage relation may be the subject of condonation, and condonation may be implied from the voluntary resumption of discontinued cohabitation. Clague v. Clague (Minn.), 49 N. W. Rep. 198. The fact that a wife voluntarily has sexual intercourse with her husband, while entertaining a suspicion or belief, derived from a statement in a newspaper, that the husband has committed adultery, is not a condonation of the offense. Shackleton v. Shackleton (N. J.), 21 Atl. Rep. 935. Under Rev. St. Ill., ch. 40, sec. 1, which makes willful desertion without reasonable cause during two years cause for divorce, the fact that complainant, during the time of the alleged desertion, went to the defendant and cohabitated with her for several days, is a complete defense to the suit. Phelan v. Phelan (Ill.), 25 N. E. Rep. 751. The defense of condonation by cohabitation after the commencement of suit, has no application where the after-conduct of the defendant is a renewal of the grounds on which the petition was based. Douglas v. Douglas (Iowa), 47 N. W. Rep. 92. Although, in an action for divorce, defendant fails to set up plaintiff's condonation of his offense in his answer, he will not be estopped from making that defense at the trial. Moore v. Moore, 41 Mo. App. 176. Where a bill for divorce on account of the wife's cruelty is filed ten years after the last act of physical violence, and more than three years after complainant abandoned his wife, her offense will be presumed to have been condoned. Hitchins v. Hitchins (Ill. Sup.), 29 N. E. Rep. 888. In an action by the wife for divorce on the ground of cruelty, it appeared that plaintiff continued to live at their home after the commencement of the suit, but she slept in a room separate from defendant, and no longer lived with him as his wife: Held, that cohabitation and forgiveness of the alleged acts of cruelty would not be presumed. Denison v. Denison (Wash.), 30 Pac. Rep. 1100, 4 Wash. St. 705. Where petitioner, having a good cause for divorce, is induced to discontinue it on promise of good behavior by defendant, to prove waiver of the condonation, the petitioner must show some act of defendant tending to establish some one of the causes of divorce, so pronounced as to raise a reasonable probability that if the marital relations are continued a new cause for divorce will be given. Marshall v. Marshall (Vt.), 26 Atl. Rep. 900. In a suit for divorce on the ground of adultery, a verdict for plaintiff was contrary to law, where there was undisputed evidence of a voluntary condonation and cohabitation after notice to plaintiff of the alleged acts tending to show that defendant had committed adultery, and the expression by him of belief in her guilt, and no evidence that adulterous acts, if committed at all, were repeated after the condonation. Phillips v. Phillips (Ga.), 17 S. E. Rep. 633. Subsequent cohabitation is no bar to a divorce for extreme cruelty. Tackaberry v. Tackaberry (Mich.), 59 N. W. Rep. 400. Cruelty and verbal abuse are condoned by subsequent cohabitation. McGurk v. McGurk (N. J. Ch.), 28 Atl. Rep. 510. For several years a husband had been guilty of acts of violence to his wife, and of continued drunkenness. A final separation occurred in January, 1889. The wife began suit for divorce in April, 1889, and, just before she did so, the husband, armed, intoxicated and threatening to kill her, broke into her house and drove her therefrom: Held, that the husband's offenses were not condoned by the cohabitation of the wife with him till October, 1888. Morrison v. Morrison (Mont.), 35 Pac. Rep. 1. Cohabitation of a husband with his wife while he suspects her chastity does not amount to condonation, where he separates from her after obtaining proof that his suspicions are well founded. Welch v. Welch, 50 Mo. App. 395. A mere voluntary promise by a wife, having a cause for divorce, to return to and live with her husband, is not a "condonation," within Civ. Code, secs. 115, 116,

defining it as a conditional forgiveness, and making essential thereto reconciliation and remission of the offense by the injured party, and restoration of all marital rights. Wolff v. Wolff (Cal.), 36 Pac. Rep. 767. A cause for divorce consisting of a chronic private disease cannot be condoned, as it exists continuously. Ryder v. Ryder (Vt.), 28 Atl. Rep. 1029. Condonation of cruel treatment is not established by evidence that, after an assault on her, petitioner remained in the same house with her husband for a week; it being shown that she did not forgive him; that he made no promise of future kind treatment; that there was no resumption of marital relations, and that she avoided him as much as possible. Rudd v. Rudd (Vt.), 28 Atl. Rep. 869. Condonation, being a conclusion of fact and not of law, means a full and absolute forgiveness of a conjugal offense, with knowledge of all that is forgiven. It is not affected by the existence of, and does not operate as a forgiveness of, other unknown adulteries. Condonation being proved, the claim for damages is ancillary to, and dependent on, the petition, and must be dismissed if the petition is also dismissed. Bernstein v. Bernstein, 6 Reports, 609. Where, eleven months after the wife condoned the husband's acts of cruelty, the husband, without provocation, seized a neck yoke, and, with threats against the wife's life, ran at her, and stopped only on her seeking refuge behind another person, condonation was revoked, under Comp. Laws, sec. 2571, providing that condonation shall be revoked when the condonee commits acts constituting a like or other cause of divorce, or shall be guilty of great conjugal unkindness, not amounting to a cause of divorce. Taylor v. Taylor (N. Dak.), 63 N. W. Rep. 893. Pending the wife's action for divorce for cruelty, the parties signed an agreement whereby the husband was to pay the wife $100 per year for the support of the children, and was to have the use of certain buildings on the homestead "until after seeding next spring," the agreement having been made in December, and was to have the bed and bedding used by him. On the trial, the husband testified that the agreement was made on the wife's promise to condone and dismiss her action, and that she subsequently cohabited with him. The wife denied the condonation, and testified, without contradiction, that she was forced to cohabit with the husband, and that the agreement was a final settlement of property questions, and she was corroborated: Held, that there was no condonation, within Comp. Laws, secs. 2569, 2570. Taylor v. Taylor (N. Dak.), 63 N. W. Rep. 893. Where a wife, after filing her bill for divorce, occupies the same room at an hotel with her husband for several months, the suit is properly dismissed, though she testify that she did not "cohabit" with him. Lee v. Lee, 51 Ill. App. 565. Though a husband, suspecting his wife of adultery, in order to get direct evidence, connive at her adultery with his brother, he is not thereby precluded from obtaining a divorce on proof of a former act of adultery with another. Bailey v. Bailey (N. H.), 29 Atl. Rep. 847. A husband who continues to occupy the same bed with his wife after he has been told that she committed adultery, will not be granted a divorce for such alleged adultery. Tilton v. Tilton (Ky.), 29 S. W. Rep. 290. Evidence that a wife had heard that her husband had committed adultery, but refused to believe the report, and lived with him for a short time thereafter, but, on being convinced of its truth, left him, and caused his arrest, is sufficient to support a finding that there was no condonation of the offense. Polson v. Polson (Ind. Sup.), 39 N. E. Rep. 498. Under Gen. St., sec. 2120, which provides that "cohabitation as man and wife, after knowledge of adultery or lewdness, shall take away the right of divorce therefor;" one who marries a woman, with full knowledge of the fact that she is already pregnant by him, cannot, in an independent action by her for alimony on the ground of abandonment, counterclaim for an absolute divorce. Steele v. Steele (Ky.), 29 S. W. Rep. 17. If a wife deserts her husband for three years, and refuses to return, he is entitled to a divorce, though on one occasion within that time he visited her, and for two nights occupied the same bed. Danforth v. Danforth, 33 Atl. Rep. 781, 88 Me. 120. Condonation of extreme cruelty may be avoided by abusive language and the use of opprobrius epithets. Heist v. Heist (Neb.), 67 N. W. Rep. 790.

BOOKS RECEIVED.

Pattison's Complete Digest of Missouri Reports, Embracing Volumes 1 to 137 of the Supreme Court Reports, and Volumes 1 to 69 of the Reports of the Courts of Appeals. In Four Volumes. Volume 1. By Everett W. Pattison, of the St. Louis Bar. St. Louis, Mo.: The Gilbert Book Company 1897.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION — Improvements.—Where decedent allowed his son to plant an orchard and put other costly improvements on a farm as though it belonged to the son, it was inequitable, on settling decedent's estate, to charge the son with full rental value of the farm, and allow him to set off merely the cost of the trees and the planting thereof, without regard to their value when in full bearing, and the care and attention bestowed on them for years.—LIGHTNER'S EX'X v. SPECK, Va., 28 S. E. Rep. 326.

2. ADVERSE POSSESSION — Notice.—Possession by a vendee under a land contract is not adverse until he has either complied with its terms, or has in some way given notice to his vendor or his assignee that he claims to hold in hostility thereto.—BURKE v. DOUGLASS, Mich., 73 N. W. Rep. 133.

3. ADVERSE POSSESSION — Running of Statute.—The statute of limitations as to land cannot run against a woman until she has become of age, or until she marries.—TAYLOR v. BRYMER, Tex., 42 S. W. Rep. 999.

4. ALIMONY—Payment—Contempt.—The court cannot compel a man to seek employment in order to earn money to pay alimony, and punish him for failure to do so.—EX PARTE TODD, Cal., 50 Pac. Rep. 1071.

5. APPEAL—Conflicting Evidence—Findings.—A chancellor's findings of fact on conflicting testimony given before him will not be reversed, unless clearly and palpably wrong.—HIGGINS v. WISNER, Ill., 48 N. E. Rep. 692.

6. APPEAL—Controverted Facts.—A fact controverted by the pleadings, though there be no conflict in the testimony, is a controverted fact, within Rev. St. ch. 110, § 89, which provides that "no assignment of error shall be allowed which shall call in question the determination of the inferior or appellate courts upon controverted questions of fact."—SMITH v. BILLINGS, Ill., 48 N. E. Rep. 683.

7. APPEAL—Jurisdiction.—Under Const. art. 6, § 12, limiting the jurisdiction of the supreme court in criminal cases to cases of felony, the St. Louis court of appeals has exclusive jurisdiction of an appeal from a judgment of conviction for malicious trespass in cutting down and destroying a hedge fence, rendered by a circuit court, though the question of title to realty is involved.—STATE v. ZINN, Mo., 42 S. W. Rep. 938.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignee for the benefit of creditors succeeds to all the rights of the assignor which are assignable, and has power to foreclose his assignor's mortgage, by advertisment, and become a good faith purchaser at the sale, under Comp. Laws, § 5419, authorizing a purchase by a mortgagee or his legal representative.—THOMPSON v. BROWNE, S. Dak., 73 N. W. Rep. 194.

9. ASSOCIATION—Action Against.—Gen. St. 1894, § 5177 (providing that, when two or more persons are associated in business under a common name, they may be sued by such name), construed, and held, that it is not necessary to state the individual names of the associates in the complaint, and that the complaint herein states a cause of action.—DIMOND v. MINNESOTA SAV. BANK, Minn., 73 N. W. Rep. 182.

10. ASSUMPSIT — Money Paid for Defendant's Use.—Where a party purchased property at an execution sale, and paid the purchase price therefor at the request of the execution defendant, to whom such property was subsequently delivered, such party is entitled to recover the amount of such payment from the execution defendant, even though the execution sale, in law, was unauthorized and void.—WRIGHT v. MORSE, Neb., 73 N. W. Rep. 211.

11. ATTACHMENT — Dissolution.—A petition for the dissolution of an attachment, which denies collectively the existence of the several grounds of attachment alleged in the affidavit, is bad, as it does not deny the existence of each ground, but only denies the existence of the combination of grounds recited.—BANE v. KEYES, Mich., 73 N. W. Rep. 230.

12. ATTACHMENT — Interplea — Res Judicata.—An action for wrongful attachment of chattels, all taken at the same time and under the same levy, cannot be maintained against the officer and the attaching creditor, where plaintiff interpleaded in the attachment action, claiming part of the property, but not that for which damages are sought, though the officer was not nominally a party to the attachment action, and a portion of the property was attached by garnishment, and was claimed by plaintiff under different titles.—WHEELER SAV. BANK v. TRACY, Mo., 42 S. W. Rep. 946.

13. ATTACHMENT — Redelivery Bond—Demand.—In a suit on a redelivery bond conditioned on recovery of judgment against the attachment debtor, to redeliver the property, or to pay its value, an allegation that plaintiff demanded of defendants that "they pay said judgment, and demanded of them the fulfillment of the obligation expressed in said undertaking," is sufficient, on demurrer, to show that demand was made as required by Code Civ. Proc. § 555, where the value of the property exceeded the amount of the judgment.—MULLALLY v. TOWNSEND, Cal., 50 Pac. Rep. 1066.

14. ATTACHMENT — Sureties on Bond to Release.—Plaintiff in an action on a note attached the property of one of the defendants, who gave an undertaking for the release of the attached property under the statute: Held that, where plaintiff obtained a judgment on the note against the defendants, it fixed the liability of the sureties on the undertaking, given to release the attachment to the extent of the undertaking.—MARCH v. BARNET, Cal., 51 Pac. Rep. 20.

15. ATTORNEYS AND COUNSELORS—Suspension and Disbarment.—Laws 1893, ch. 21, relating to attorneys and counselors, and providing for their suspension and disbarment, and the procedure when an affidavit charging an attorney with embezzlement or other professional misconduct is filed, and repealing all acts and parts of acts in conflict therewith, is not in conflict with, and does not repeal, Comp. Laws, § 473, declaring that conviction of a felony or of a misdemeanor involving moral turpitude is cause for revocation or suspension, and that the record of conviction is conclusive evidence.—IN RE KIRBY, S. Dak., 73 N. W. Rep. 92.

16. AWARD—Validity—Conclusiveness.—Where a controversy has been submitted to arbitration, and the arbitrators make their award by simple announcement of the result, without stating the reasons or the law governing them, such award must be held conclusive and binding upon the parties, in the absence of proof of undue influence or that any evidence was excluded.—MAYBERRY v. MAYBERRY, N. Car., 28 S. E. Rep. 349.

17. BANKS—Collections.—A bank receiving commercial paper for collection is liable for the defalcations of its agents employed in the collection thereof.—STATE NAT. BANK OF FT. WORTH v. THOMAS MANUFG. CO., Tex., 42 S. W. Rep. 1016.

18. BANKS—Deposits—Set Off.—A bank has the right to offset the deposit of a depositor by a demand note due the bank.—CITIZENS' SAV. BANK v. VAUGHAN, Mich., 73 N. W. Rep. 143.

19. BANKS — Insolvency — Following Trust Funds.—Where customers' notes are transferred by A bank to P bank as collateral, under an agreement that said A bank shall collect said notes, and account to P bank in such Portland and Eastern exchange as it might receive in course of business, and, said notes are collected, and the proceeds mingled with the other assets of the bank, and the funds of the said bank are not increased thereby, after which the said A bank assigns, having no part of the proceeds of said securities on

hand, and the assignee pays, the amount of said securities to P bank as *cestui que trust*, if the facts created a trust, the fact that there was no fund on which the trust could operate would defeat it.—IN RE ASSIGNMENT OF BANK OF OREGON, Oreg., 51 Pac. Rep. 87.

20. BANKS AND BANKING—Covert Borrowing by Bank.—If, for the purpose of enabling a bank to borrow without having its printed statements show it as a borrower, another bank credits a sum to the borrower's account, and charges the same to a special account, and takes an individual guaranty note from the borrower's directors, amounts drawn on the credit constitute a loan to the bank, and not to its directors.—AMERICAN EXCH. NAT. BANK OF NEW YORK V. FIRST NAT. BANK OF SPOKANE FALLS, U. S. C. C. of App., Ninth Circuit, 82 Fed. Rep. 961.

21. BENEVOLENT SOCIETY—Expulsion of Member—Review.—Expulsion of one from a beneficial association for calling other members "a lot of sons of dogs" cannot be reviewed by a court, he having had due notice and a fair trial according to the constitution and bylaws of the society; the constitution declaring, as purposes of the society, "the moral tuition of each other, and the propagation of general intelligence, unity, friendship, and brotherly love among all members," and declaring that, "if any member be guilty of improper conduct, he shall be fined, suspended, or expelled, at the discretion of the society."—JOSICH V. AUSTRIAN BENEVOLENT SOC. OF SAN JOSE, Cal., 51 Pac. Rep. 18.

22. BILLS AND NOTES—Compromise and Settlement—Fraud.—If notes executed in compromise of a pending litigation were procured by the false and fraudulent representation of the payee that there was a certain sum, unappropriated, in the hands of a receiver, there can be no recovery thereon, if the maker did not know whether the representation was true or not, and relied upon it as true in executing the compromise agreement.—MEGUIAR V. FESLER, Ky., 42 S. W. Rep. 920.

23. BILLS AND NOTES — Indorsement.—When a certificate of deposit is indorsed in blank before delivery to payee, in the absence of evidence of an agreement to the contrary the indorsers are liable as original promisors, and not as mere indorsers.—SCANLAND V. PORTER, Ark., 42 S. W. Rep. 897.

24. BILLS AND NOTES—Negotiability—Indorsement.—The bare fact that the clerk of a general agent of an insurance company had indorsed the name of a local agent to various papers with the local agent's approval was no evidence of authority to indorse in his name a premium note made payable to the local agent, and sent by him to the general agent. — BRESEE V. CRUMPTON, N. Car., 28 S. E. Rep. 351.

25. BILLS AND NOTES—Release of Maker—Indorsees.—After commencement of suit by the indorsee against the indorser of notes of a corporation which was then hopelessly insolvent, the indorsee, with other general creditors of the corporation, entered into an agreement with it whereby delinquent assessments were to be collected and paid over to the creditors *pro rata* in satisfaction of their claims: Held, that the indorsee did not thereby release the indorser from liability on the notes, the latter having also signed the compromise agreement. — MULNIX V. SPRATLIN, Colo., 50 Pac. Rep. 1078.

26. BONDS—Corporate Bonds — Transfer.—Where the owner of corporate stock and bonds, with coupons attached, which he had previously pledged to plaintiff, transferred to plaintiff absolute title to the stock and bonds by contract which bound plaintiff to redeliver them on payment of a certain sum, but which did not mention the coupons, and no mention thereof was made by either party when the contract was made, and no demand was made for their surrender or intimation given that title thereto was not to pass, and plaintiff was allowed to retain possession thereof, the title to such coupons passed with title to the bonds. — FOX V. HARTFORD & W. H. H. R. Co., Conn., 38 Atl. Rep. 871.

27. BROKERS — Compensation — Parties.—In the absence of contract with the principal or actual assignment of interest by the broker, one to whom the broker promised part of his commission is not a necessary party in an action by the broker against the principal to collect the commission. — BRACKENRIDGE V. CLARIDGE, Tex., 42 S. W. Rep. 1005.

28. BUILDING AND LOAN ASSOCIATIONS — Contracts Ultra Vires. — A building and loan association organized under Act July 1, 1879, requiring subscriptions to capital stock to be made payable in periodical installments, which shall continue until the payments, together with the earnings of the association, shall equal the full face value of the shares, etc., has no authority to issue a certificate wherein it agrees to pay the subscriber the full face value of each share ($100) at the end of six years, on payment of 75 cents per month on each share during said period. — KING V. INTERNATIONAL BUILDING, LOAN & INVESTMENT UNION, Ill., 48 N. E. Rep. 677.

29. BUILDING ASSOCIATION—Insolvent Building Associations. — Notice of withdrawal, given by a stockholder in a building and loan association after it has become insolvent, does not entitle such stockholder to a preference over other stockholders in the distribution of assets.—GIBSON V. SAFETY HOMESTEAD & LOAN ASSN., Ill., 48 N. E. Rep. 580.

30. CARRIERS OF GOODS — Delivery — Negligence.—A common carrier, who negligently delivers goods to one impersonating the true consignee, is liable therefor.—PACIFIC EXP. CO. V. CRITZER, Tex., 42 S. W. Rep. 1017.

31. CARRIERS—Passenger—Negligence.—A shipper of animals who contracts for his own passage on a freight train to attend the same assumes the risks reasonably incident to the running of such trains. — HEYWARD V. BOSTON & A. R. CO., Mass., 48 N. E. Rep. 773.

32. CARRIERS OF PASSENGERS — Injuries to Licensees.—One who got aboard of the caboose of one of defendant's freight trains at a place other than a station which train did not carry passengers, and on which the conductor was forbidden, by defendant's rules, to allow persons to ride, and was injured in a collision, was not entitled to recover therefor, on proof merely that he entered the caboose and rode therein with the conductor's consent, and was injured by the negligence of defendant's servants, where there was evidence that he knew the conductor had no right to permit him on the train. — CLEVELAND, C., C. & ST. L. RY. CO. V. BEST, Ill., 48 N. E. Rep. 684.

33. CHATTEL MORTGAGES — Assignment. — A paper which states, "I hereby assign, release, and deliver to J S all my right, title, and interest in the security or property covered by the following described chattel mortgages," is an assignment of the mortgages, and not a cancellation of them.—AULTMAN, MILLER & CO. V. SLOAN, Mich., 78 N. W. Rep. 128.

34. CONSTITUTIONAL LAW — Eminent Domain—Water Reservoir.—St. 1895, ch. 488, which provides for the construction of a reservoir and system of water-works, and which provides for compensation to be ascertained and paid for all property taken, is not unconstitutional, as denying to some property owners "the equal protection of the laws," although more favorable provisions for compensation are made for property in some localities than in others. — BURNETT V. COMMONWEALTH, Mass., 48 N. E. Rep. 758.

35. CONSTITUTIONAL LAW — Legislative Regulations — Stock Yards. — A stock yard business, located in a large city, at the junction of many railroad lines, which furnishes the only proper facilities for the unloading, resting, and feeding of live stock in transit, and for the sale of cattle within said city, is affected with a public use, so as to be subject to legislative control, and the proper legislative body may prescribe a maximum rate of compensation for the care and handling of stock thereat. — COTTING V. KANSAS CITY STOCK YARDS CO., U. S. C. C., C. (Kan.), 82 Fed. Rep. 850.

36. CONSTITUTIONAL LAW — Taking Property without Due Process.—In determining whether State legislation limiting or regulating the charges of a corporation engaged in a business affected by a public interest, as that of a stock yards business, amounts to a taking of property without due process of law, the primary inquiry is whether the act deprives the owners of a fair and reasonable return on their investment, the rights of the public being considered. And, in determining what is the investment upon which a reasonable return must be allowed, the legislature is not bound to accept the present valuation of the corporate stock, which has been builded up to a premium on the assumption that its *status* would continue the same and the legislature would never exercise its power of regulating charges.—COTTING V. KANSAS CITY STOCK YARDS CO., U. S. C. C., D. (Kan.), 82 Fed. Rep. 839.

37. CONTEMPT OF STATE COURT. — Petition to federal court for *habeas corpus*, alleging that petitioner's conviction and detention were in violation of the provision of the United States constitution for due process of law, because he was put on trial under information, and not indictment, presents a federal question, so that appeal to the Supreme Court of the United States from the denial of the writ works a stay under Rev. St. U. S. § 766, notwithstanding said court has in other cases decided that trial under information is due process; wherefore, the warden of the State prison is not in contempt of the State courts for refusal to execute the death warrant on petition pending the appeal.—IN RE EDGAR, Cal., 51 Pac. Rep. 29.

38. CONTRACT—Construction—Indefiniteness.—A contract by which defendant oil company agreed to sell plaintiff its oil on such reasonable terms as to enable him to compete successfully with other parties selling in the same territory was too indefinite and too general to be enforceable as a contract. — MARBLE V. STANDARD OIL CO., Mass., 48 N. E. Rep. 783.

39. CONTRACT — Duress. — At the command of his father, of whom he stood in fear, a child signed a mortgage four days after becoming of age, to secure a loan made to the father of money used to improve the child's property. About a year afterwards he signed a renewal of the mortgage, knowing what it was for, and the time it was to run; but he testified that he signed it to keep peace in the family: Held not to show duress. — DETROIT NAT. BANK V. BLODGETT, Mich., 73 N. W. Rep. 120.

40. CONTRACT—Evidence.—In an action on an alleged executed contract, under, the common counts, plaintiff must prove by a preponderance of the evidence a complete performance of his part of the contract.—PARMLY V. FARRAR, Ill., 48 N. E. Rep. 698.

41. CONTRACTS — Interpretation. — Defendants contracted with plaintiffs to cut all the marketable timber on plaintiffs' land, with an agreement that plaintiffs "shall have the right to dictate from time to time what timber is marketable:" Held, that defendants cannot complain that plaintiffs prevented them from cutting all the marketable timber. — HAINES V. GIBSON, Mich., 73 N. W. Rep. 126.

42. CONTRACTS — Mechanic's Lien.—Under a contract to excavate for and build a foundation of a mill at a specified price, and to set the machinery at a certain price per day, labor performed in excavating and constructing beds for the engine and other machinery is properly charged at the rate prescribed for setting the machinery. — STOKES V. GREEN, S. Dak., 73 N. W. Rep. 100.

43. CONTRACT — Parol Contemporaneous Contract. — Where a written contract has been entered into, which is complete in its terms, and by the terms of an oral contract made at the same time it was agreed that the written contract should not become binding until the happening of a condition precedent, it is error, in an action on the written contract, to exclude evidence of the terms of the oral contract. — CLEVELAND REFINING CO. V. DUNNING, Mich., 73 N. W. Rep. 239.

44. CONTRACT—Time of Performance. — Where a contract for the sale of land provides for a commission for effecting the sale, but does not fix the time when the said commission shall be paid, a contemporaneous oral agreement, made by the agent of the parties to the written contract, fixing the time of payment, may be shown, and it will bind the parties to the written contract, where they have received the benefits thereof; and Civ. Code, § 1657, which provides, "if no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly it must be performed immediately upon the thing to be done being exactly ascertained,"—would not, therefore, in that case, apply. — WOLTERS V. KING, Cal., 51 Pac. Rep. 35.

45. CONTRACTS OF EMPLOYMENT—Tenant.—A contract whereby defendant agreed to employ plaintiff until its factory, the construction of which had been begun, should be completed and in operation (no time for completion being fixed, however), and to give him continuous employment thereafter, is too uncertain as to the term of employment to enable plaintiff, who was discharged before the factory was completed, to maintain an action thereon for damages for refusal to furnish further employment, the contract being determinable at the election of either party; the rule, "*certum est quod certum reddi potest*," having no application.—SPEEDER CYCLE CO. V. TEETERS, Ind., 48 N. E. Rep. 595.

46. CONTRACT OF PURCHASE — Construction.—Where the entire agreement for the sale and purchase of a farm consists of letters, and the deed is executed, delivered, and accepted as the result of such correspondence, and without any other or different agreement or contract, held, that such correspondence constitutes a contract, and that such contract was contemporaneous with the deed, and that by such contract the grantor might reserve the immature crops.—SURFACE V. LEFFINGWELL, Kan., 51 Pac. Rep. 73.

47. CORPORATIONS — Consolidation.—When corporations are consolidated into a new corporation, under Laws 1892, ch. 691, outstanding notes of the constituent corporations are not paid or discharged, so as to relieve the consolidated corporation of liability therefor, by the taking of renewal notes after the consolidation, unless it is so intended by the parties, nor is the right of the creditor against the new company affected by taking judgments upon the notes against the old companies.—IN RE UTICA NAT. BREWING CO., N. Y., 48 N. E. Rep. 521.

48. CORPORATIONS—Contracts—Ratification.—For the purpose of showing ratification of a contract by a corporation whose president entered into it, and apparently had authority to do so, evidence is admissible that he told the directors, though individually, and while not sitting as a board, what he had done, and that they approved thereof, and that, with this knowledge, no action was taken to interfere with the contract, but that the parties proceeded to its execution. —HENRY V. COLORADO LAND & WATER CO., Colo., 51 Pac. Rep. 90.

49. CORPORATIONS—Insolvency—Stockholders.—Held, following Hospes v. Car Co., 50 N. W. Rep. 1117, 48 Minn. 174, and Hastings Malting Co. v. Iron Range Brewing Co., 67 N. W. Rep. 652, 65 Minn. 28, that the original holders of *bonus* or watered stock of a corporation issued as paid up, and their transferees with notice, will, in case of the insolvency of the corporation, be charged, in favor of a creditor who became such after the stock was issued, with the difference between the par value of the stock and the amount paid the corporation therefor, to the extent necessary to satisfy the creditor's claims.—WALLACE V. CARPENTER ELECTRIC HEATING MANUFG. CO., Minn., 73 N. W. Rep. 189.

50. CORPORATIONS — Irrigation Company — Assessments.—Where a corporation organized for the purpose of constructing a canal to be used for the distri-

bution of water for irrigating purposes upon the lands of the stockholders in such corporation, whose stock, as shown by its certificates, represents five inches of water to each share of stock, and whose articles of incorporation provide for the assessment of paid up stock, when authorized by a three fourths vote of all the stockholders. It is proper and legal for such assessments to be made, and the collection thereof enforced, under the provisions of the statute.—HALL v. EAGLE ROCK & WILLOW CREEK WATER CO., Idaho, 51 Pac. Rep. 110.

51. CORPORATIONS — Liabilities of Stockholders.—When a subscriber has fully paid for his corporate stock, he is not liable to the corporation or its creditors for any obligations, unless there is failure to properly incorporate, when he is liable, as a partner, for the debts of the concern.—GAINEY v. GILSON, Ind., 48 N. E. Rep. 633.

52. CORPORATIONS — Liability of Stockholders.—Section 2599, Gen. St. 1894, construed, and held, that a shareholder in a corporation cannot affect his constitutional liability for the prior debts of the corporation by a *bona fide* sale of his stock to a solvent party, and a transfer thereof on the books of the corporation.—GUNNISON v. UNITED STATES INV. CO., Minn.; 73 N. W. Rep. 149.

53. COURTS — Concurrent Jurisdiction — Creditors' Suit.—A suit by creditors against the debtor and his trustee for creditors, not brought for the administration of the estate among the creditors generally, but to secure a lien on, and divert to payment of complainants' claims, the share which by the deed of trust would fall to other creditors, is not a creditors' suit, and hence not excepted from the rule that, as between courts of concurrent jurisdiction, the one first acquiring jurisdiction shall dispose of the whole controversy.—CRAIG v. HOGE, Va., 28 S. E. Rep. 317.

54. CREDITORS' SUIT—Execution and Return.—Where a creditor of an insolvent corporation filed a bill on behalf of himself and all other creditors, and a receiver for the corporate assets has been appointed, another judgment creditor may appear and have his rights determined, without first having an execution issue and a return *nulla bona*.—COMSTOCK-CASTLE STOVE CO. v. BALDWIN, Ill., 48 N. E Rep. 723.

55. CRIMINAL EVIDENCE — Confessions.—Where defendant's signed confession purported to be voluntary and to have been made after a warning that it might be used in a prosecution, and it was admitted in evidence, and there was a conviction, the court could not say, on exceptions, that the confession was inadmissible as a matter of law, although they were strong reasons for excluding it.—COMMONWEALTH v. BOND, Mass., 48 N. E. Rep. 756.

56. CRIMINAL EVIDENCE — Homicide.—Upon the trial of a defendant for the murder of a woman with whom he was living in adultery, it is competent, as tending to show motive, to prove by the woman's husband the fact of her marriage to him, and that the defendant had enticed her away.—PEOPLE v. SUTHERLAND, N. Y., 48 N. E. Rep. 518.

57. CRIMINAL EVIDENCE — Homicide.—Evidence that defendant stabbed deceased in the region of the heart with a knife, inflicting a bloody wound nearly three-fourths of an inch wide, that deceased immediately fell down, and that he expired 15 minutes later, is sufficient proof of the *corpus delicti*.—THOMPSON v. STATE, Tex., 42 S. W. Rep. 974.

58. CRIMINAL EVIDENCE—Privileged Communication—Physicians.—Code Civ. Proc. § 834, does not prevent a physician, who has attended and prescribed for a defendant on trial for murder, while he was in prison and up to the day before giving the evidence, from testifying that, after the conclusion of the relation, he conversed with the defendant on a subject not relating to his health, nor from stating what the defendant said to him, nor from testifying to the difference in defendant's appearance in court from that in prison previous to his trial.—PEOPLE v. KOERNER, N. Y., 48 N. E. Rep. 731.

59. CRIMINAL LAW—Arson — Haystacks.—Haystacks are *ejusdem generis* as "goods, wares or merchandise," and therefore properly embraced under the word "chattels," in Rev. St. 1889, § 3512, declaring guilty of arson in the fourth degree one who willfully burns any "goods, wares or merchandise or other chattels of another not the subject of arson in the third degree."—STATE v. HARVEY, Mo., 42 S. W. Rep. 938.

60. CRIMINAL LAW — Assault with Intent to Kill.—Where defendant, after an altercation with prosecutor, went upstairs and came down with a pistol, and the evidence was conflicting as to whether prosecutor attacked him as he came down, and before he had made any hostile demonstration, an instruction making defendant's right of self-defense depend on whether he procured the weapon to protect himself as he left the building, or to renew the conflict, was erroneous, his purpose being immaterial if prosecutor began the second attack.—HUTCHINSON v. STATE, Tex., 42 S. W. Rep. 992.

61. CRIMINAL LAW—Assault with Intent to Kill.—On prosecution for assault on L with intent to kill, evidence that defendant entered the residence of L, where a party was in progress, cursing B, whereupon L ordered him from the house, following which was the assault, is admissible as showing the *animus* of defendant in entering the house, and raising a disturbance, armed, or apparently armed, with a deadly weapon.—STATE v. RAPER, Mo., 42 S. W. Rep. 935.

62. CRIMINAL LAW—Attempt at Rape.—The words "an assault with actual violence upon the body of a female with intent to commit a rape," found in Gen. St. § 1407, mean the same as the words "an attempt to commit rape," which legally designate a common-law crime.—ROOKEY v. STATE, Conn., 38 Atl. Rep. 911.

63. CRIMINAL LAW — Conspiracy.—The essence of a conspiracy is the unlawful combination, and not the accomplishment of the ultimate purpose; the combination becoming an offense because of the unlawful object to be effected, or the unlawful means to be employed.—STATE v. THOMPSON, Conn., 38 Atl. Rep. 868.

64. CRIMINAL LAW—Destroying Personal Property.—A promissory note or duebill is "personal property," within Code, § 1082, as amended by Laws 1885, ch. 88, making it an offense to willfully and wantonly injure the personal property of another, since Code, § 3765, provides that, in the construction of statutes, the words "personal property" shall include evidences of debt.—STATE v. SNEED, N. Car., 28 S. E. Rep. 965.

65. CRIMINAL LAW—False Personation.—Pen. Code, § 529, declaring that "every person who falsely personates another, and in such assumed character either becomes bail or surety for any party, is punishable," etc., does not refer to a case where a person assumes merely an official character.—PEOPLE v. KNOX, Cal., 51 Pac. Rep. 19.

66. CRIMINAL LAW—False Pretenses.—The indictment charges that the defendant procured from one B a large sum of money, to-wit, $1,800, by falsely pretending he had, as her attorney, commenced a suit for her, and expended that sum in its prosecution: Held, that it was competent to show on the part of the State that the defendant had procured several sums at different times under this false pretense, and that it was not necessary to prove that he had obtained as much as $1,800.—CUNNINGHAM v. STATE, N. J., 38 Atl. Rep. 847.

67. CRIMINAL LAW—Forgery—Indictment.—If an instrument alleged to have been forged is of such a character as not to import a legal liability on its face, it may be made the subject of such a charge by alleging in the indictment such facts and circumstances as will, when taken in connection with the instrument itself, invest it with apparent legal efficacy, and enable the court judicially to see that the instrument has a capacity to defraud.—STATE v. WILLS, Minn., 73 N. W. Rep. 177.

68. CRIMINAL LAW—Fornication.—The indictment for fornication containing an allegation that the parties were not living together, the charge should make the fact of their living apart necessary to conviction. — MITCHELL v. STATE, Tex., 42 S. W. Rep. 989.

69. CRIMINAL LAW—Hearsay Evidence.—Acts and declarations of the prosecutor when he made the complaint, and in the absence of defendant, showing reluctance to prosecute the case, were incompetent to rebut evidence introduced by defendant to prove that prosecutor was unfriendly to him at the time referred to, no part of said acts or declarations having been elicited by defendant from the prosecutor, or from the witness who testified thereto.—MILLSAPS v. STATE, Tex., 42 S. W. Rep. 991.

70. CRIMINAL LAW—Homicide — Self-Defense.—Where a willful killing has been admitted or proved beyond a reasonable doubt, the burden is on the accused to show such facts as would excuse or mitigate the homicide; and, though mitigating circumstances are shown, the burden still rests on defendant to show facts in justification. — STATE v. BYRD, N. Car., 28 S. E. Rep. 353.

71. CRIMINAL LAW — Indictment — Forgery. — The offenses of forgery and of uttering a forged instrument cannot be charged in one indictment, not being named in Cr. Code, § 127, as offenses which may be joined. — HUFF v. COMMONWEALTH, Ky., 42 S. W. Rep. 907.

72. CRIMINAL LAW — Jurisdiction. — The word "jurisdiction," as used in Burns' Rev. St. 1894, § 1643 (Rev. St. 1881, § 1574), providing that every person committing an offense against the laws of the State is liable to punishment in the county having jurisdiction, refers to jurisdiction of the person, and not to the subject-matter of the offense. — STATE v. HERRING, Ind., 48 N E. Rep. 598.

73. CRIMINAL LAW—Seduction.—Where the indictment charged the seduction to have been committed while the prosecuting witness "remained in the care and protection, custody, and employment" of defendant, it is sufficient, though the language used in Rev. St. 1889, § 3487, on which the indictment was based, is, "while she remains in his care, custody, or employment."—STATE v. NAPPER, Mo., 42 S. W. Rep. 957.

74. CRIMINAL LAW—Theft.—Where it is admitted that the defendant obtained the property alleged to have been stolen with the consent of the owner, an instruction which authorizes the jury to convict if the defendant obtained it without the consent of the owner is erroneous. — SANDERS v. STATE, Tex., 42 S. W. Rep. 983.

75. CRIMINAL PRACTICE—Attempt to Kill—Indictment. —An indictment in a prosecution for attempt to kill, under Pub. St. ch. 202, § 32, which alleges, in substance, "that defendant feloniously, willfully, and maliciously attempted to murder L by placing a quantity of deadly poison, known as 'Rough on Rats,' known to the defendant to be deadly poison, upon, and causing it to adhere to, the under side of the crossbar of a cup of L's, known as a 'mustache cup,' the cup being then empty, with the intent that L should thereafter use the cup for drinking while the poison was there, and should swallow the poison," sufficiently sets forth a criminal offense.—COMMONWEALTH v. KENNEDY, Mass., 48 N. E. Rep. 770.

76. CRIMINAL PRACTICE—Indictment—Variance.—The allegation of an indictment that the accused feloniously broke and entered the poultry house of P is supported by evidence that he thus entered one of several compartments under a continuous roof, that entered being completely separated from the others, and being in the exclusive possession of P, as a tenant, and used by him as a poultry house.—STATE v. BUECHLER, Ohio, 48 N. E. Rep. 507.

77. CRIMINAL PRACTICE — Receiving Stolen Cattle. — The buying or receiving of cattle, knowing them to have been stolen, is by statute in this State made an ndependent, substantive crime; hence it is not essential, in an indictment therefor, that the name of the original thief be alleged. — REAM v. STATE, Neb., 73 N. W. Rep. 227.

78. DAMAGES—Evidence.—Even where the law implies damages such as necessarily result from a wrongful act complained of, proof is required to show the extent and amount of damages.—DAVIS v. TEXAS & P. RY. CO., Tex., 42 S. W. Rep. 1008.

79. DEATH BY WRONGFUL ACT.—A widow has no right of action against persons wrongfully causing the death of her husband. Code, § 1498, gives the right of action to the personal representative of the person killed. — HOWELL v. COMMISSIONERS OF YANCEY COUNTY, N. Car., 28 S. E. Rep. 362.

80. DEED—Acknowledgment—Feme Covert. — Where a magistrate is about to take a private examination of a *feme covert*, prior to her execution of a mortgage, he should explain to her the statute requiring that she be examined separate and apart from her husband, and he should see that the statutory provisions are strictly complied with. — MCCASKILL v. MCKINNON, N. Car., 28 S. E. Rep. 343.

81. DEEDS—Covenants.—The grantor in a conveyance of a house and lot is not liable on the usual covenants therein that the property "is free from all incumbrances;" that he is "lawfully seised in fee-simple;" and that he will "warrant and defend the same against the lawful claims and demands of all persons" for money paid the municipal authorities by his grantee to establish a connection with the city sewer, though at the time the property was transferred the grantor had arranged for no other sewer connection than by surreptitiously connecting his drain with that of an adjoining owner, which was itself properly connected with the city sewer in the street.—BUMSTEAD v. COOK, Mass., 48 N. E. Rep. 767.

82. DEEDS—Recording. —The fact that a grantee, immediately upon learning that a deed that had been delivered for record was withdrawn, by the unauthorized act of an agent, before being spread in full upon the records, delivered it a second time for record, did not affect its operation as a recorded instrument from the date of its first delivery.—PARRISH v. MAHANY, S. Dak., 73 N. W. Rep. 97.

83. DEED—Unrecorded Deed—Creditors.—The holders of judgments on claims against an estate are not "creditors," within Conveyance Act, p. 944, § 30, providing that all deeds, etc., shall take effect from the record of the same, as to all creditors and subsequent purchasers without notice, since such creditors must be judgment creditors having a lien, and such judgments are not liens on land left by the intestate; and grantees of the intestate take the land free from such judgments, though their deeds were recorded after the judgments were entered.—NOE v. MOUTRAY, Ill., 48 N. E. Rep. 709.

84. DEED, WHEN A MORTGAGE. — It is competent for either a grantor or a grantee in a deed to prove that it was in fact a mortgage.—KELLOGG v. NORTHRUP, Mich., 73 N. W. Rep. 231.

85. DIVORCE—Alimony — Separate Action.—Where a wife obtains a divorce from her husband in this State without a decree for alimony, he being personally served with process, she cannot thereafter maintain a separate action against him for alimony.—WEIDMAN v. WEIDMAN, Ohio, 48 N. E. Rep. 506.

86. DOWER — Election.—The execution of an election by a widow to take under a will, and the filing of the same with the clerk, will not estop her from afterwards making an election to take under the law, except as to innocent parties who may have been induced to deal with the property on account of such election. —DUDLEY v. PIGG, Ind., 48 N. E. Rep. 642.

87. DRAINAGE ASSESSMENTS — Lien.—Rev. St. 1893, ch. 120, § 253, providing for the foreclosure in equity of the lien for taxes, where there have been two forfeitures for non-payment and want of bidders at the sale, applies to special assessments for drainage purposes.—HAMMOND v. PEOPLE, Ill., 48 N. E. Rep. 573.

88. DRAINAGE DISTRICTS—Power to Contract.—An assessment levied to pay a drainage district's indebtedness will not be sustained, where the amount, nature, and character of the debt are not sufficiently shown, in view of Const. art. 4, § 31, limiting the power of drainage districts to the maintenance and repair of "levies, drains and ditches."—WINKELMANN V. MORDOCK & IVY LANDING DRAINAGE DIST. NO. 1, Ill., 48 N. E. Rep. 715.

89. DRAINAGE—Easements—Injunction.—For the purpose of preventing threatened injury to land, and avoiding a multiplicity of damage suits, one may be restrained from flooding the lands of another with waters that would not naturally flow thereon.—DRAKE V. SCHOENSTEDT, Ind., 48 N. E. Rep. 629.

90. EJECTMENT — Burden of Proof.—In ejectment under Rev. St. 1894, § 1069 (Rev. St. 1881, § 1057), the burden is upon the plaintiff to show his title, and the failure of the defendant to establish any title can afford the plaintiff no ground for recovery.—GRAHAM V. LUNSFORD, Ind., 48 N. E. Rep. 627.

91. EMINENT DOMAIN — Change of Grade.—Under Const. art. 6, § 13, providing that private property shall not be taken for public use or damaged without just compensation, which shall be paid before possession is taken, a complaint alleging that plaintiff, as owner of certain lots, had erected a house and made improvements on the natural grade of the street, and that defendant city threatened to change the grade, thereby damaging her property, and that defendant had not compensated nor offered to compensate her therefor, is sufficient to support an injunction.—SEARLE V. CITY OF LEAD, S. Dak., 73 N. W. Rep. 101.

92. EMINENT DOMAIN — Condemnation—Injunction.—Injunction is the proper remedy against the appropriation of land by a railroad corporation which has not acquired a right to the proposed use either by purchase or condemnation, although the relief is sought in vindication of a purely legal right.—BASS V. METROPOLITAN WEST SIDE EL. R. CO., U. S. C. C. of App., Seventh Circuit, 82 Fed. Rep. 857.

93. ESTOPPEL OF RECORD — Res Judicata.—A judgment affirming the validity of a sale and transfer of property is conclusive upon the parties thereto, with respect to all the property covered by that entire transaction, although but part thereof was in fact the subject-matter of the issues in the case in which the judgment was rendered.—PETERSON V. WARNER, Kan., 50 Pac. Rep. 1091.

94. EXECUTION—Exemptions.—Under Code Civ. Proc. § 690, exempting the farming "utensils or implements of husbandry" of a judgment debtor, a combined harvester, regardless of its value, is exempt to a farmer engaged extensively in raising grain, where he uses it principally in harvesting his own crops, and not in harvesting the crops of others.—IN RE KLEMP'S ESTATE, Cal., 50 Pac. Rep. 1062.

95. EXECUTION — Levy on Intoxicating Liquors.—A levy of execution by a sheriff or constable on intoxicating liquors, and a sale thereunder, are in violation of the letter and spirit of the constitution and statutes of this State, and cannot be sustained by the courts.—STANDARD OIL CO. V. ANGEVINE, Kan., 51 Pac. Rep. 70.

96. EXECUTION SALE — Title Acquired.—Defendant bought at constable's sale all the right, title, and interest which plaintiff had in a tract of land by virtue of a possessory claim as a pre-emption settler. Plaintiff afterwards proved up and paid for said land, and secured a patent therefor: Held, that plaintiff's title was not affected by the constable's sale to defendant.—RUPERT V. JONES, Cal., 51 Pac. Rep. 26.

97. FEDERAL COURTS—Vacancy in Office of Judge.—During the continuance of a vacancy in the office of judge of a district court for a district the limits of which are co-extensive with those of the State, no other judge has authority to discharge the functions of that tribunal, and all judicial action must remain in abeyance until the vacancy be filled, unless a judge shall have been designated and appointed pursuant to law to exercise in such district during the vacancy the powers and duties attached to the office of district judge for that district.—UNITED STATES V. MURPHY, U. S. D. C., D. (Del.), 82 Fed. Rep. 898.

98. FEDERAL OFFENSE — Use of Mails to Defraud.—The act of March 2, 1889 (25 Stat. 873), entitled "An act to punish dealers and pretended dealers in counterfeit money and other fraudulent devices for using the United States mails," and which amended Rev. St. § 5480, by inserting therein an enumeration of various ways or devices for using the mails to defraud, did not repeal this section, or narrow its scope to the specific schemes and artifices so specified; and an indictment describing a scheme to defraud by sending letters requesting the persons addressed to sell and ship to defendant articles of merchandise, for which he did not intend to pay, states a punishable offense, under the statute.—CULP V. UNITED STATES, U. S. C. C. of App., Third Circuit, 82 Fed. Rep. 980.

99. FRAUDULENT CONVERSION—Evidence.—A person, for five months accustomed to frequently hiring buggies and teams of the keeper of a livery stable, and keeping the same beyond the time of hiring without objection by the owner, hired of him a buggy and harness to use for several days in driving to a certain point, to which he went, returning in seven or eight days. He then used the property for one day, openly, near the owner's place of business: Held, that he was not guilty of fraudulent conversion.—CANNON V. STATE, Tex., 42 S. W. Rep. 981.

100. FRAUDS, STATUTE OF—Pleading.—In an action on an oral contract within the statute of frauds, where the complaint does not disclose whether the contract is written or oral, it is necessary for the defendant to plead the statute, in order to avail himself of the objection.—MATTHEWS V. MATTHEWS, N. Y., 48 N. E. Rep. 531.

101. FRAUDULENT CONVEYANCES — Consideration.—Where one conveyed land in fraud of his creditors, and the grantee participated in the fraud, the moral obligation under which the grantee stood was a sufficient consideration to support a deed of reconveyance made in pursuance of an oral agreement to reconvey, as against creditors of the original grantee, who had not acquired liens on the property at the time of the reconveyance.—BICCOCHI V. CASEY-SWASEY CO., Tex., 42 S. W. Rep. 963.

102. FRAUDULENT CONVEYANCE—Opening and Closing Case.—Plaintiff in attachment has the right, as against interpleader, to open and close, the latter having in her interplea set up that she was the owner of the attached premises, and the former, in its plea, having not merely denied that fact, but admitted she had a deed thereto, and alleged that it was given by defendant to defraud his creditors, to the knowledge of interpleader, and she having, by replication, denied these facts, and concluded to the country.—CASSELL V. FIRST NAT. BANK OF VINCENNES, IND., Ill., 48 N. E. Rep. 701.

103. GAMING — Contracts for Future Delivery.—The fact that a cotton mill corporation purchases cotton for future delivery, through a broker, and puts up margins necessary to carry it, does not render the purchases *ultra vires*, if they were not in fact speculations on the rise and fall of cotton, but were made in the ordinary and legitimate business of the mill for its own use.—SAMPSON V. CAMPERDOWN COTTON MILLS, U. S. C. C., D. (S. Car.), 82 Fed. Rep. 833.

104. GARNISHMENT — Fund in Bank—Assignment.—Checks drawn against a fund on deposit, but not presented and paid until after the garnishment of such fund, did not operate as equitable assignments thereof.—MCINTYRE V. FARMERS' & MERCHANTS' BANK, Mich., 73 N. W. Rep. 233.

105. GARNISHMENT — Trustee Process — Lien.—In trustee process, mere acceptance of service of the writ by the trustee does not create a lien on the fund as

against a claimant thereof.—CREED v. GILMAN, Mass., 48 N. E. Rep. 778.

106. GUARANTY—Exhausting Other Security.—Where one guaranties payment of a mortgage debt, the mortgagee may sue on the guaranty without proceeding to realize on the mortgage.—ADAMS v. WALLACE, Cal., 51 Pac. Rep. 14.

107. HABEAS CORPUS — Jurisdiction.—Under Const. art. 4, § 4, declaring that "the supreme court shall have power to issue writs or orders of *habeas corpus*," etc., it may grant any relief for which writs are an appropriate remedy; and hence it may issue a writ of *habeas corpus* for the purpose of determining whether a person in custody may be admitted to bail.—STATE v. FARRIS, S. Car., 28 S. E. Rep. 308.

108. HOMESTEAD EXEMPTION.—A debtor may acquire a homestead, and hold it exempt from execution for debts created before its acquisition, but not then reduced to judgment; and this although the homestead was obtained by exchange for property which was liable for the payment of such debts.—PAXTON v. SUTTON, Neb., 73 N. W. Rep. 221.

109. HUSBAND AND WIFE—Enticing and Alienating.—A husband's complaint for alienating his wife's affections, alleging that the wife was persuaded to "abandon him, his house and home, and to live away and apart from him," makes it sufficiently clear that he and the wife were living together.—JONAS v. HIRSHBURG, Ind., 48 N. E. Rep. 656.

110. HUSBAND AND WIFE—Gift to Wife—Presumption.—Where a husband negotiates the purchase of lands, and procures the title to be placed in his wife's name, and mortgages his own other property, with that bought for her, to pay for the latter, and actually gives her the money raised on the mortgage, it is a complete gift to the wife, and casts upon the husband, or his heirs, who dispute it, the burden of proving an obligation on her part to pay back the money, or some agreement on her part that the whole debt should be charged primarily on her property, leaving the husband's liable only for the deficiency.—MORAN v. NEVILLE, N. J., 38 Atl. Rep. 851.

111. HUSBAND AND WIFE — Mechanic's Lien.—In an action against husband and wife to foreclose a mechanic's lien, where it was shown that the land was owned by the wife, that she knew of the improvements, had helped to select material, had directed the work, and had evinced an expectation to pay for work and material, it was error to enter a nonsuit.—FOSKETT & BISHOP CO. v. SWAYNE, Conn., 38 Atl. Rep. 893.

112. INJUNCTION—Jurisdiction—State Court.—Rev. St. § 720, which declares that federal courts shall not by injunction stay proceedings in State courts except in bankruptcy matters, does not deprive a federal court of jurisdiction to enjoin proceedings in a State court as ancillary to granting relief in a case in which the federal court has jurisdiction.—TERRE HAUTE & I. R. CO. v. PEORIA & P. U. R. Co., U. S. C. C., N. D. (Ill.), 82 Fed. Rep. 943.

113. INJUNCTION—Sufficiency of Bill.—A bill for an injunction to restrain a trespass set out a *prima facie* case of title in complainant to the land in question, and alleged quiet and undisturbed possession until about three years before, when defendants, citizens of Tennessee, came upon the land with force, and threw down complainant's fences, drove their cattle and sheep upon the grazing and meadow lands, and destroyed hay, and that from that time on they had greatly injured him in the enjoyment of his property, and that they had again begun to repeat their acts of trespass, and were committing great depredation and waste on the land: Held, sufficient.—MILLER v. WILLS, Va., 28 S. E. Rep. 837.

114. INSURANCE—Concurrent Insurance—Waiver.—It is evidence of waiver of provision in policy that there shall be no other insurance on the property during the life of the policy, without consent of the company written thereon, that the company's agent, when receiving the premium, knew of other insurance on the property, effected between the issuance of the policy and the payment of the premium, and that there was never any offer to return the premium; and this whether the policy took effect at the time of its issuance or not till payment of the premium.—SCHROEDER v. SPRINGFIELD FIRE & MARINE INS. CO., S. Car., 28 S. E. Rep. 371.

115. INSURANCE—Payment of Premium.—Under a provision in defendant's policy of insurance to plaintiff that, unless the premium be paid at the company's home office at the time the policy was issued (such payment to be evidenced only by the president's receipt accompanying the policy), or within 30 days by check or draft direct to the company, payable to the president, the policy should be null and void, defendant's receipt in full of premium charged plaintiff, and the testimony of defendant's agent that he delivered the policy, collected the premium, and remitted same to defendant, less his commission, is sufficient to prove the payment of said premium. — WICKTORWITZ v. FARMERS' INS. CO., Oreg., 51 Pac. Rep. 75.

116. INTERPLEADER—Collusion.—Where a bill of interpleader is defective for want of an affidavit alleging no collusion between the parties, the defect can be corrected only by leave to amend, and the filing of a new bill, with the necessary affidavit, or by filing a written affidavit as a part of the bill, including the necessary statement.—HOME INS. CO. OF CITY OF NEW YORK v. CAULK, Md., 38 Atl. Rep. 901.

117. INTOXICATING LIQUOR — Screens. — Under Act March 11, 1895, § 10, which provides that all the provisions of the act to regulate the sale of liquor shall apply to persons whether prosecuting business under the laws of Indiana or under the laws of the United States, a person is indictable for violation of such act, although licensed under the laws of the United States.—STATE v. MATHIS, Ind., 48 N. E. Rep. 645.

118. INTOXICATING LIQUORS—Search Warrant.—Where a search warrant is issued under the provisions of the prohibitory liquor law directing the search of a building occupied by two or more tenants in separate and distinct tenements, and intoxicating liquors are found in one of such tenements only, the officer must, under the statute, take possession of and close such tenement, but cannot close the tenements of the other tenant or tenants.—STATE v. MARKUSON, N. Dak., 73 N. W. Rep. 82.

119. JUDGMENT—Administration.—Where defendant, on the strength of an allegation in plaintiffs' complaint, admitted that plaintiffs were administrators, where the probate records would show that such was not the fact, he could not be relieved of a judgment against him, under Code, § 195, authorizing relief from a judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect.—MARTIN v. FOWLER, S. Car., 28 S. E. Rep. 313.

120. JUDGMENT—Collateral Attack.—Validity of the original cause of action on which judgment was rendered against a city cannot be questioned collaterally in a proceeding to enforce the judgment by *mandamus*.—CITY OF SHERMAN v. LANGHAM, Tex., 42 S. W. Rep. 961.

121. JUDGMENT— Foreign Judgment — Jurisdiction.—The will of S, a resident of New Jersey, gave certain property to her children, and directed that her husband should hold the same in trust for them during their minority. S died in New Jersey, and her will was proved there, and the court of chancery of that State, in a proceeding subsequently instituted there on behalf of the children by their next friend, adjudged that the will created a trust, and appointed a new trustee, after the death of S's husband: Held, that the subject-matter of the proceeding in the New Jersey court was within its jurisdiction, and, unless it appeared that notice had not been given to some party entitled to notice, its determination as to the existence of a trust was binding upon the courts of New

York in a proceeding subsequently arising.—SMITH v. CENTRAL TRUST CO. OF NEW YORK, N. Y., 48 N. E. Rep. 553.

122. JUDGMENT — Lien. — While a judgment in this State, in a general sense, binds all the property, both real and personal, of the person against whom it is rendered, the lien of such judgment, in the special sense which prevents the alienation of the property of the debtor after its rendition, attaches only to such property of the debtor as is capable of seizure and sale under execution based upon such judgment.—FIDELITY & DEPOSIT CO. OF MARYLAND v. EXCHANGE BANK OF MACON, Ga., 28 S. E. Rep. 393.

123. JUDGMENT LIENS—Priority.—Where a grantee of land fails to record his deed until after a judgment is obtained against the grantor, the lien of the judgment plaintiff will not be postponed, as to other land of the grantor, to liens of judgments rendered after such deed was recorded, because such judgment plaintiff voluntarily released his lien on the land conveyed.—BLAKEMORE v. WISE, Va., 28 S. E. Rep. 332.

124. LIMITATIONS—Judicial Sale.—A tax sale is not a judicial sale, within the statute declaring the period within which action shall be brought against the purchaser for recovery of lands sold at judicial sale.—WORTHEN v. FLETCHER, Ark., 42 S. W. Rep. 900.

125. LANDLORD AND TENANT—Eviction.—The building by a third person, with the landlord's consent, of a wall encroaching on the demised premises, to an extent variously estimated at from 9 inches to 2 feet, for a distance of 34 feet, constitutes an eviction, though it does not render the premises uninhabitable for the purpose for which they were hired, or materially change the character and enjoyment thereof.—SMITH v. MCENANY, Mass., 48 N. E. Rep. 781.

126. LANDLORD AND TENANT — Lien of Landlord — Mortgage—Priorities. — Goods were bought upon an agreement that a mortgage should be given to secure the purchase money advanced by the mortgagee, and such a mortgage was given. Subsequently the goods were placed on premises demised to the mortgagor by a lease containing a covenant that "improvements made upon the said premises" the lessee should leave undisturbed, for the benefit of the premises, without charge: Held, the title of the mortgagor to the goods was in the nature of a transitory seisin, and the purchase money mortgage preceded any right of the lessor under the covenant in the lease. — AMES v. TRENTON BREWING CO., N. J., 38 Atl. Rep. 858.

127. LANDLORD AND TENANT—Oil Lease—Implied Covenants.—Where lands are granted, demised and let for the purpose and with the exclusive right of drilling and operating for oil and gas, in consideration that a certain part of the oil produced should be delivered to the lessor, the lease providing that one well should be completed within six months, and in default, the lease to be null and void, and the lease being silent as to the drilling of other wells or the protection of lines: Held, that in such a lease there is an implied covenant on part of the lessee that he will drill and operate such number of oil wells on the lands as would be ordinarily required for the production of oil contained in such lands, and afford ordinary protection to the lines.—HARRIS v. OHIO OIL CO., Ohio, 48 N. E. Rep. 502.

128. LANDLORD AND TENANT — Security for Rent — Liquidated Damages.—Plaintiffs leased from defendants a building at an advance rental of $250 per month, giving a mortgage on lands worth $7,200 to secure the punctual performance of their agreement. Subsequently the mortgage was released, and the lessees deposited with the lessors $250, with the provision that in event of non-payment of rent the deposit should be forfeited: Held, that such deposit was for security only, and not by way of liquidated damages, or penalty for non-performance.—CARSON v. ARVANTES, Colo., 50 Pac. Rep. 1080.

129. LIEN—Seed Lien—Enforcement.—The holder of a seed lien had, before the enactment of section 4845, Rev. Codes, no right to take possession of the property covered by his lien, even after default, but must have enforced his right to possession in a court of equity in an action to foreclose the lien.—BLACK v. MINNEAPOLIS & NORTHERN ELEVATOR CO., N. Dak., 73 N. W. Rep. 90.

130. LIFE INSURANCE — False Representations.—The term "in good health," in a life insurance policy, is comparative; and an assured is in good health unless affected with a substantial attack of illness, threatening his life, or with a malady which has some bearing on the general health.—MANHATTAN LIFE INS. CO. OF NEW YORK v. CARDER, U. S. C. C. of App., Fourth Circuit, 82 Fed. Rep. 986.

131. LIFE INSURANCE — Husband and Wife.— Where the wife, without the husband's knowledge or consent, has procured a policy of insurance on his life for her benefit, and used his money in paying the premiums, he may recover from the company the money thus paid.—METROPOLITAN LIFE INS. CO. v. MONAHAN, Ky., 42 S. W. Rep. 924.

132. LIMITATIONS—Action on Official Bond.—The liability of an officer to pay over money to the county treasurer, as required by law, is one created by statute; and an action thereon against the sureties on the bond can only be brought within three years after the cause of action has accrued.—BOARD OF COM'RS OF CLOUD COUNTY v. HOSTETLER, Kan., 51 Pac. Rep. 62.

133. LIMITATIONS—Note Due at Option.—By the terms of a mortgage securing the payment of a note due in five years, the holder has an option to declare the note due in advance of maturity, by its terms, upon the occurrence of defaults of the maker. There is in such case a further extension of time in the parties' contemplation, and the statute of limitation does not begin to run against the cause of action on the note until the holder exercises such option, by declaring the note due or some act equivalent thereto.—YORK-RITCHIE EXCH. & INV. CO. v. MITCHELL, Kan., 51 Pac. Rep. 57.

134. LIMITATIONS — Written Acknowledgment.—Letters by a debtor, acknowledging that a note is due, but not expressing any intent not to pay it, are a sufficient written acknowledgment of a continuing contract, within Code, § 131, to remove the bar of limitations, though they express an expectation to pay from the proceeds of sale of certain property, but do not contain an unconditional promise to pay.—HILL v. HILL, S. Car., 28 S. E. Rep. 309.

135. LIMITATION OF ACTIONS—Implied Promise—Corporations.—Under statutes making stockholders liable for corporate debts in case the same cannot be collected from the corporation, the liability is based upon an implied promise created by the acceptance of the stock, within the purview of the Illinois statute barring actions on oral contracts in five years.—HUTCHINGS v. LAMPSON, U. S. C. C., N. D. (Ill.), 82 Fed. Rep. 960.

136. LOST INSTRUMENTS—Evidence to Establish.—In an action to establish a lost deed, it is immaterial that the deed was made in pursuance of an illegal or non-enforceable contract, at least unless the deed was voidable even if it had not been lost.—TOWLE v. SHERER, Minn., 73 N. W. Rep. 180.

137. MALICIOUS PROSECUTION—Pleading.—In an action against a corporation for malicious prosecution, it is not necessary to set out in the complaint the name and authority of the agent of the corporation who did the act complained of.—INDIANA BICYCLE CO. v. WILLIS, Ind., 48 N. E. Rep. 646.

138. MALICIOUS PROSECUTION—Probable Cause.—The fact that defendant in an action for malicious prosecution had, before instituting the proceedings, consulted an attorney, who advised him that he had a meritorious suit, will, in the absence of a showing of bad faith, constitute a probable cause.—PAWLOWSKI v. JENKS, Mich., 73 N. W. Rep. 288.

139. MANDAMUS—Issuance in Vacation.—In an application for a writ of *mandamus*, where issues of fact are

presented for trial, a judge of the district court cannot allow a peremptory writ at chambers in vacation. The trial of such issues must be at a session of court in the home forum, or place of the litigation.—MAYER v. WILKINSON, Neb., 73 N. W. Rep. 214.

140. MANDAMUS—Title to Office.—While *mandamus* is not the appropriate remedy to determine the title to a public office, yet sufficient investigation may be made in such a proceeding to ascertain whether the relator has a *prima facie* title to the office in question.—CRUSE v. STATE, Neb., 73 N. W. Rep. 212.

141. MARRIAGE—Breach of Marriage Promise.—An action lies in this State for the breach of a promise of marriage, and the plaintiff therein may recover compensation for wounded feelings and for the pain and mortification occasioned by the defendant's conduct. For such damages no measure can be prescribed except the enlightened consciences of impartial jurors.—PARKER v. FOREHAND, Ga., 28 S. E. Rep. 400.

142. MASTER AND SERVANT—Assumption of Risk.—An experienced servant, ordered to work in a vat used for mixing pulp, assumes the risk of injuries caused by a fall in attempting to step from a beam to a ladder, though the beam was in a slippery condition, caused by the use of soda ash in cleaning the same, where plaintiff knew that soda ash was in general use in the mill, but did not know that it had been used in the vat, particularly as plaintiff could have observed the wet condition of the beam, and need not have used the same.—THOMPSON v. NORMAN PAPER CO., Mass., 48 N. E. Rep. 757.

143. MARRIED WOMEN—Contracts.—A wife is not liable on a note given by her jointly with her husband for the price of a horse purchased by both jointly.—CALDWELL v. JONES, Mich., 73 N. W. Rep. 129.

144. MASTER AND SERVANT—Assumption of Risk.—A servant who discovers a defect in the machinery with which he works, and notifies his master thereof, and continues in the employment upon a promise by the master to correct the evil, and is afterwards injured by reason of the master's neglect to repair, can recover, provided that ordinary prudence would not have prevented the injury.—TEXAS & N. O. R. CO. v. BINGLE, Tex., 42 S. W. Rep. 971.

145. MASTER AND SERVANT—Contract of Employment—Discharge.—Even if a provision in a contract between a railroad company and its engineers that any discharged engineer should be reinstated if arbitrators, provided for by the contract, should find that there was no just cause for the discharge, is against public policy, it is severable from another provision that no engineer should be discharged except for cause, and does not invalidate such other provision.—ST. LOUIS, I. M. & S. RY. CO. v. MATHEWS, Ark., 42 S. W. Rep. 902.

146. MASTER AND SERVANT—Contributory Negligence—Defective Machine.—Though a master knows, or ought to know, of the defective condition of a machine, this alone does not make him responsible for injuries to a competent workman who knew, or ought to have known, of the defective condition, but who continued to work at the machine, and made no complaint thereof.—ROSKEE v. MT. TOM SULPHITE PULP CO., Mass., 48 N. E. Rep. 766.

147. MASTER AND SERVANT—Fellow-servants.—One who is a member of the same gang, doing the same work, and receiving the same pay as the others, but acts as a leader or foreman in the work, is not a vice-principal, but a fellow-servant.—MOORE LIME CO. v. RICHARDSON'S ADMX., Va., 28 S. E. Rep. 334.

148. MASTER AND SERVANT—Negligence.—An employer is not called upon to instruct its ordinary employees, competent for the proper performance of their regular duties, in regard to their conduct in so unexpected an emergency as the discovery of a fire.—GILMORE v. MITTINEAGUE PAPER CO., Mass., 48 N. E. Rep. 623.

149. MASTER AND SERVANT—Negligence—Assumption of Risk.—It is the duty of the master to exercise reasonable care to provide a safe place for his servant to work in, for his protection from all but the assumed and excepted dangers, and this duty remains the same where the dangers arise to the servant by reason of the adoption or use of a system by which the business of the master is performed or conducted.—BELLEVILLE STONE CO. OF NEW JERSEY v. MOONEY, N. J., 38 Atl. Rep. 835.

150. MASTER AND SERVANT—Negligence—Dangerous Premises.—The servant of an electric company was directed to take down a wire belonging to said company, but strung on a pole belonging to a railroad company, and he was injured by the breaking of the pole under his weight. The defect in the pole was not obvious, nor known to him, but might have been discovered by the electric company by inspection: Held, that the electric company was liable.—SAN ANTONIO EDISON CO. v. DIXON, Tex., 42 S. W. Rep. 1009.

151. MASTER AND SERVANT—Negligence—Duties and Liabilities of Master.—The duties of a master to furnish his servant reasonably safe machinery and other appliances, a reasonably safe place to work, and instructions and warnings against special dangers attending hazardous duties to all servants who, from youth, inexperience or imbecility, are ignorant of such special dangers, are of a personal nature, and, if delegated by the master to another servant, no matter what his title may be, nor what his grade or rank in the master's service, the master will be responsible for their nonperformance, or for their negligent performance, notwithstanding the master has exercised due care in the selection of the agent to whom such duties are intrusted.—CAMP v. HALL, Fla., 22 South. Rep. 792.

152. MASTER AND SERVANT—Negligence—Injury to Employee—Evidence—Vice Principal.—It is not the absolute duty of the servant, upon entering upon his work, to ascertain the dangers and risks connected therewith. The measure of his duty is ordinary care.—HOLMAN v. KEMP, Minn., 73 N. W. Rep. 186.

153. MASTER AND SERVANT—Railroads—Negligence.—Where a brakeman, while leaning from the end of a gondola car while the train was in motion, for the purpose of removing the pin from the drawhead after detaching a car, was thrown from the car and killed, the mere fact that there was a "hard jerk" of the train at the time is not sufficient to show negligence on the part of those in charge of the train.—LOUISVILLE & N. R. CO. v. FOX, Ky., 42 S. W. Rep. 922.

154. MASTERS IN CHANCERY—Conclusiveness of Findings.—Masters in chancery are not judicial, but ministerial, officers, whose findings are only *prima facie* correct, and not binding on the chancellor nor courts of review; but it is the duty of the court, where exceptions are filed, to approve or disregard the master's conclusions as they appear to be in accordance with or against the weight of the evidence.—ENNESSER v. HUDEK, Ill., 48 N. E. Rep. 673.

155. MECHANICS' LIENS.—A contract for the construction of a building for $760, not being governed by Code Civ. Proc. § 1184, relative to time and mode of payments, which applies only where the contract price is $1,000 or more, is valid, though none of such price is to be paid till completion and acceptance of the building; and therefore, the contractor having abandoned the work when it was half done, and the owner having completed it at a cost of $676, only $84 is subject to the lien of one who furnished materials to the contractor.—DENISON v. BURRELL, Cal., 51 Pac. Rep. 1.

156. MECHANIC'S LIEN—Notice—Description.—Under section 5476, Comp. Laws, a mechanic's lien is valid, although the notice of lien does not state the name of the owner of the land against which the lien is filed.—RED RIVER LUMBER CO. v. FRIEL, N. Dak., 73 N. W. Rep. 203.

157. MECHANIC'S LIEN—Parties.—Where two contractors furnish labor and material towards the erection of

an improvement on real estate in pursuance of separate contracts with the owner therefor, and one of said contractors files his claim for a lien under the statute, and then brings suit to have established and foreclosed such lien, the other contractor is a proper and necessary party to such suit, although at the time the action was brought he had not filed his claim for a lien.—WAKEFIELD v. VAN DORN, Neb., 73 N. W. Rep. 226.

158. MECHANICS' LIENS—Property Subject—Sidewalks. —Inasmuch as statutes allowing liens in favor of certain persons and classes of persons are in derogation of the common law, and therefore are to be strictly construed, the statute of this State allowing liens in favor of contractors "for work done and material furnished in building, repairing or improving any real estate of their employers" cannot be held to authorize a lien in favor of such persons for paving a sidewalk in a public street adjacent to the lot of the employer, but which of itself constitutes no part of a building constructed under the same contract of employment under which such sidewalk was laid.—SEEMAN v. SCHULTZE, Ga., 28 S. E. Rep. 378.

159. MORTGAGES — Assignment to Grantee. — Where land passes, by mesne conveyances containing covenants for the discharge of a mortgage thereon, to one who afterwards dies, and his executor, for the purpose of keeping the mortgage alive, takes an assignment thereof in his individual capacity, without authority from the probate court, or allowance of the mortgage debt as a claim against the estate, he does not thereby pay the debt, so as to let in the judgment creditor of an intermediate grantee, but, on his foreclosure of the mortgage, takes the legal title.—KEET v. BAKER, Mo., 42 S. W. Rep. 940.

160. MORTGAGES — Partial Release — Deficiency. — Where the mortgagee released parts of the mortgaged property without the knowledge or consent of the mortgagor, and without crediting the debt with the full value of the parts so released, he was not entitled to a deficiency judgment, under Code Civ. Proc. § 726, providing that there can be but one action to collect a debt or enforce a right secured by mortgage, and authorizing a personal judgment in case of a deficiency in the proceeds of foreclosure sale, as the sale contemplated by that section is of the entire mortgaged premises.—WOODWARD v. BROWN, Cal., 51 Pac. Rep. 2.

161. MORTGAGES — Pleading. — An allegation that a mortgage was executed and delivered is broad enough to include the signing, sealing, attestation and acknowledgment. — LAURENT v. LANNING, Oreg., 51 Pac. Rep. 80.

162. MORTGAGES — Priority — Assignment. — Though Civ. Code, § 1214, provides that every subsequent conveyance of realty is void as against a subsequent mortgagee in good faith whose conveyance is first recorded, yet, as section 1217 declares that an unrecorded instrument is valid as to those who have notice thereof, a second mortgagee cannot claim precedence over a prior unrecorded mortgage, of which he has actual notice at the time of the execution of the second mortgage.—COUNTY BANK OF SAN LUIS OBISPO v. FOX, Cal., 51 Pac. Rep. 11.

163. MORTGAGES—Release—Priority.—The owner of a trust deed executed after the one named as owner in a former trust deed had made entry of satisfaction on the book for recording deeds has a prior lien upon the trust property, as against the *bona fide* indorsee, before such entry, of the notes that the former trust secured, in view of Code, § 2498, providing that an entry of satisfaction "shall operate as a release of the incumbrance."—EVANS v. ROANOKE SAV. BANK, Va., 28 S. E. Rep. 323.

164. MORTGAGES — Sale of Equity of Redemption. — When several lots, covered by the same mortgage, are conveyed at the same time to different purchasers, the mortgagee, with notice of the conveyances, may not release a lot to one purchaser, without the consent of all the others, for less than the proportional part of the debt which the value of the lot released bears to the value of all the land (the security being worth more than the debt); and on giving such release he is equitably chargeable with such amount, in favor of the owners of the remaining lots.—BROOKS v. BENHAM, Conn., 38 Atl. Rep. 908.

165. MORTGAGE FOR FUTURE ADVANCES—Priority. — A mortgage to secure future advances is, as against a subsequent judgment, a valid security for all advances made before actual notice of such judgment.—SCHMIDT v. HEDDEN, N. J., 38 Atl. Rep. 843.

166. MUNICIPAL CORPORATION—Assumption of Debt of Former Municipality.—Act April 13, 1891, provides a method of abolishing municipal corporations, and declares that their property shall be turned over to the county treasurer, and applied to the payment of the municipal debts. It also provides that, if an abolished municipality is reincorporated, the new corporation, upon majority vote of the tax paying voters, may take the property and assume the debts of the old one: Held, that an assumption of such indebtedness without a vote of the tax payers was illegal.—CITY OF BROWNWOOD v. NOEL, Tex., 42 S. W. Rep. 1014.

167. MUNICIPAL CORPORATION — Boards of Health — Negligence.—Plaintiffs, who had suffered damages by reason of the negligence of a city board of health in allowing one who had been exposed to smallpox to enter plaintiffs' boarding house as a guest, could not maintain action against the city, since the board of health represents the entire State.—GILBOY v. CITY OF DETROIT, Mich., 73 N. W. Rep. 128.

168. MUNICIPAL CORPORATIONS—Boundaries.—Under a charter providing that the boundaries of a town shall be "one-fourth of a mile east, west, north and south from the center of the town, and shall run with the four cardinal points of the compass," the boundary is a square, whose sides run east and west and north and south, the center of each line being one-fourth mile from the center of the square.—STATE v. RAINEY, N. Car., 28 S. E. Rep. 366.

169. MUNICIPAL CORPORATION—City Employee—Dismissal.—When the superiors of a city employee have power to dismiss him for neglect of duty, it is immaterial what language is used to effect his dismissal, provided it is so understood by him; and when it is shown that a letter demanding his immediate resignation has been sent to such employee, and that, after its receipt, he has failed to report for duty, and has repeatedly asked to be "reinstated," the evidence is susceptible of no other inference than that he understood that he was discharged.—RYAN v. MAYOR, ETC. OF CITY OF NEW YORK, N. Y., 48 N. E. Rep. 513.

170. MUNICIPAL CORPORATIONS—Control of Streets—Railroads.—A municipal government invested with the ordinary power to regulate streets is a trustee for the public, and its control over the streets is restricted to acts in furtherance of the rights of the public in them. —INHABITANTS OF CITY OF BURLINGTON v. PENNSYLVANIA R. CO., N. J., 38 Atl. Rep. 849.

171. MUNICIPAL CORPORATIONS—Defective Sidewalks —Contributory Negligence. — Where a person was aware of the general dangerous condition of a certain sidewalk, and that it was a dangerous place to cross after dark, but was not aware that a certain board thereof was loose or rotten, and attempted, in going to his home, to pass on said sidewalk after dark, and stepped upon said loose and rotten board, and was injured thereby, there being another route by which he could have easily, conveniently and safely gone home, he is guilty of contributory negligence.—WAKLEY v TOWN OF BOSWELL, Ind., 48 N. E. Rep. 637.

172. MUNICIPAL CORPORATIONS — Government of Schools.—A parol contract made with a teacher by a city council is valid, in the absence of a provision in the city charter requiring such contracts to be in writing.—ROBERTS v. CLAY CITY, Ky., 42 S. W. Rep. 909.

173. MUNICIPAL CORPORATIONS—Licenses.—Under St. 1893, p. 358, authorizing boards of supervisors to license

certain kinds of business "transacted and carried on" in their counties, an ordinance requiring the procurement of a license by every person "engaged" in the kind of business specified is valid, the words "transacted and carried on" being synonymous with "engaged in."—INYO COUNTY v. ERRO, Cal., 51 Pac. Rep. 32.

174. MUNICIPAL CORPORATIONS—Negligence—Defective Streets.—A notice to a policeman of a defect in a street is a notice to the city, where he is charged with the duty of remedying or reporting defects.—CUMMINGS v. CITY OF HARTFORD, Conn., 38 Atl. Rep. 916.

175. MUNICIPAL CORPORATIONS—Past Indebtedness—Constitutional Inhibition.—Const. art. 11, § 18, declaring that no city shall incur indebtedness exceeding in any year the income of such year, does not require that a judgment rendered for a past indebtedness shall provide that it be paid out of the revenues received for the years in which it was incurred.—BUCK v. CITY OF EUREKA, Cal., 50 Pac. Rep. 1065

176. MUNICIPAL CORPORATIONS—Peddlers—License.—A city ordinance, that hawkers, peddlers, etc., should pay a weekly license of five dollars, is not unreasonable and therefore void.—PEOPLE v. BAKER, Mich., 73 N. W. Rep. 115.

177. MUNICIPAL CORPORATIONS—Special Assessments—Due Process of Law.—A special assessment against a homestead for street paving is not a "tax" within Const. art. 16, § 50, subjecting homesteads to forced sales for taxes due thereon.—LOVENBERG v. CITY OF GALVESTON, Tex., 42 S. W. Rep. 1024.

178. MUNICIPAL CORPORATIONS—Streets.—A municipal corporation may maintain an action to condemn land for a public street, under Code Civ. Proc. pt. 3, tit. 7, relating to condemnation proceedings in general, before it has resorted to the steps and processes contemplated by St. 1889, p. 70, relative to the laying out of streets of municipalities. — CITY OF LOS ANGELES v. LEAVIS, Cal., 51 Pac. Rep. 34.

179. MUNICIPAL CORPORATIONS—Street Improvements—Assessments.—Where an assessment is imposed on a city lot to pay the cost of improving a street upon which it abuts, and the owner thereof, having two distinct grounds for contesting the validity of such assessment, one of which is common to him and the owners of all the other abutting lots, the other pertaining to his lot only, elects to bring an action for the benefit of himself and the other abutting owners to enjoin its collection, based on the grounds common to all, he should be deemed to have waived his right to bring a second action on the other ground, which pertained to his lot only. — CITY OF CINCINNATI v. EMERSON, Ohio, 48 N. E. Rep. 667.

180. MUNICIPAL CORPORATIONS — Water Rents—Taxation.—Gen. St. § 3312, subd. 71, forbidding cities to levy a special tax for water rents exceeding three mills on the dollar "for" any one year, does not prohibit a city from levying a greater tax "in" any one year, to pay what is due the water company under its contract with the city, where no water tax has been levied for several years, and the levy then made does not exceed the three-mill rate for each year of the entire period to be covered thereby.—BOWEN v. WEST, Colo., 50 Pac. Rep. 1085.

181. NATIONAL BANK—Misapplication of Funds—Fictitious Checks. — An indictment under Rev. St. § 5209, against officers of a national bank and a depositor, charged willful misapplication of the funds of the bank, with intent to injure and defraud the bank. On the trial it appeared that the depositor made and deposited fictitious checks, which were credited to his account: Held, that it was necessary to show that some portion of the funds were withdrawn from the possession or control of the bank, or a conversion in some form was made thereof, so that the bank would be deprived of the benefit thereof. — DOW v. UNITED STATES, U. S. C. C. of App., Eighth Circuit, 82 Fed. Rep. 904.

182. NEGLIGENCE. — Where the court instructed that there could be no recovery for an injury to a child, if she was sufficiently bright and well informed to know what adults know about the dangers she incurred when the injury was inflicted, a further charge that, if the jury finds "her mind reasonably mature, there is nothing further to inquire about," was not misleading.—HINE v. BAY CITIES CONSOL. Ry. Co., Mich., 73 N. W. Rep. 116.

183. NEGLIGENCE — Burden of Proof — Instruction. — Where the real issue, as made before the jury, was the negligence of the defendant, it was not error for the court to charge that the burden of proof of the entire case was on the plaintiff, and to refuse to charge that the burden of showing plaintiff's want of care was on defendant.—DOYLE v. BOSTON & A. R. Co., U. S. C. C. of App., First Circuit, 82 Fed. Rep. 869.

184. NEGLIGENCE — Damages.—Held, that the verdict was justified by the evidence, and that it was not excessive. When the issue is whether the present bodily ailments of a party were caused by certain injuries, a medical expert may give an opinion as to the cause of such bodily ailments founded upon a statement of the nature of the injury, the subsequent symptoms of the party, and his present physical condition, as testified to by others. — DONNELLY v. ST. PAUL CITY RY. Co., Minn., 73 N. W. Rep. 157.

185. NEGLIGENCE — Damages — Tenant. — The negligence of a tenant in removing certain pipes placed in the leased building for the purpose of extinguishing fires does not render him liable for the loss of the building by fire, in the absence of anything to show that, if the pipes had not been removed, the fire could have been extinguished; the negligence being too remote.—FRANKE v. HEAD, Ky., 42 S. W. Rep. 913.

186. NEGLIGENCE—Dangerous Premises — Warning.—Where a child is injured by the machinery in a mill where she has theretofore been allowed to play, a warning that she should not go there, given her by her teacher at the request of the mill owner, will not preclude her recovery, unless she also had notice that the warning was given at the request of the mill owner.—DUBLIN COTTON-OIL CO. v. JARRARD, Tex., 42 S. W. Rep. 959.

187. NEGLIGENCE — Defective Highways — Proximate Cause. — Where a team became mired in a highway, and, under the strain of getting out, one of the horses burst a blood vessel, and shortly after died, it was the direct and immediate consequence of the defect in the road.—DAVIS v. INHABITANTS OF LONGMEADOW, Mass., 48 N. E. Rep. 774.

188. NEGLIGENCE — Directing Verdict.—Where, in an action to recover for the alleged negligent acts of the defendant, the undisputed evidence, when construed most favorably to the plaintiff, is insufficient to warrant the inference of negligence, it is the duty of the court to direct a verdict for the defendant.—EKLUND v. CHICAGO, St. P., M. & O. R. Co., Neb., 73 N. W. Rep. 224.

189. NEGLIGENCE—Injury to Child—Action by Parent.—A parent cannot recover for loss of the services of his minor son, due to an injury received by the son while in defendant's employ, after having been employed without the knowledge of the parent, if the injury was not due to negligence of defendant. — WILLIAMS v. SOUTHERN RY. Co., N. Car., 28 S. E. Rep. 367.

190. NEGLIGENCE—Knowledge of Vicious Animal.—In an action to recover damages for an injury done by a pair of runaway horses, proof that they had run away on another occasion, 10 days before, of which the owner had notice, is not sufficient to invoke the rule as to liability for harboring animals of known vicious propensities, when it is also shown that the horses have been driven for several years on street cars, appearing during that time kind and gentle, and that, on both occasions of their running away, they were frightened by boys hallooing and throwing snowballs; nor would such evidence justify the submission to a jury of the

question whether the owner of the horses was negligent in coutinuing to use them. — BENOIT v. TROY & L. R. CO., N. Y., 48 N. E. Rep. 524.

191. NEGLIGENCE — Electricity. — Where a telephone company and an electric railroad company used the same poles for their wires, the law did not absolutely require the telephone company, as between it and its linemen, to inspect and test guy wires and circuit breakers put in by such railroad company, to discover whether they were in a safe condition, but whether the employer or the employee should discharge such duty depended on the circumstances of the particular case. —BERGIN v. SOUTHERN NEW ENGLAND TEL. CO., Conn., 38 Atl. Rep. 888.

192. NEW TRIAL — Newly-Discovered Evidence. — Newly discovered evidence that the payee declared that the note sued on was paid is to the same effect as a declaration made subsequent to the execution of the note, that he and the maker were "square now," and hence it is cumulative.—OFFUTT v. GOWDY, Ind., 48 N. E. Rep. 655.

193. NOVATION—What Constitutes.—Defendant, holding a carryall under a bill of sale as security for a debt left it with a carriage maker to be repaired. He agreed with the debtor to give up his claim on payment of the bill for repairs, and gave an order to the debtor on the persons in possession to deliver it on payment of charges: Held, that an agreement by the debtor with the persons in possession to look to the plaintiff as paymaster for the bill was a discharge of the defendant, and a compliance with the terms of the order. — PLUMMER v. GREENWOOD, Mass., 48 N. E. Rep. 782.

194. OFFICER — Supervising Architect.—An architect, employed by commissioners for the construction of a public building, to supervise the erection of the building, does not thereby become the incumbent of an office.—STATE v. BROOME, N. J., 38 Atl. Rep. 841.

195. OFFICER DE FACTO—Town Supervisors. — An appointment to the office of chairman of the board of supervisors of the defendant town, made by the appointing board thereof, having by law the power to appoint only in case of a vacancy (which vacancy they assumed really existed), and the acceptance of the appointment by the person therein named, and his entering into possession of said office and discharging its duties, constitute him the chairman of the board *de facto*, although no vacancy in fact existed. Hence bonds of said town issued by said board were valid obligations. — FULTON v. TOWN OF ANDREA, Minn., 73 N. W. Rep. 256.

196. PARTITION — Description in Deed.—The duties of a referee appointed in an action for partition, to sell the property in question, are ministerial in their nature, and he possesses no authority to transfer any property, except in pursuance of the decree directing the sale. Accordingly, when such a referee conveys property by a description covering other property than that described in the complaint and in the decree of sale, his deed passes no title to the purchaser.—HELLER v. COHEN, N. Y., 48 N. E. Rep. 527.

197. PARTITION — Parties.—Where neither complainant nor defendants in a suit for partition claim any rights adverse to a railroad right of way across the lands in question, the railroad company need not be made a party to the suit. — HOOPER v. MCALLISTER, Mich., 73 N. W. Rep. 133.

198. PARTNERSHIP — Action between Partners. — A partner may sue his copartner at law where the cause of action is not connected with the partnership accounts, and their consideration is not involved. — HALLECK v. STREETER, Neb., 73 N. W. Rep. 219.

199. PARTNERSHIP — Non-trading Partnership. — The enunciation in a charge that, in a non-trading partnership a partner has no implied power to bind the other partner is nullified by the further statement that if D and B were partners, each of them having made contributions of capital or labor, which were put together in a common enterprise, to be used for carrying on business for a common benefit, if such a partnership existed B would be liable on the note executed by D in their names, or if it was held out that they were partners B would be liable thereon. — MCPHERSON v. BRISTOL, Mich., 73 N. W. Rep. 286.

200. PRINCIPAL AND SURETY—Bond and Contract Construed. — A condition in a bond given to secure the return of samples to the business house intrusting them to a salesman, which reads that the samples intrusted "to us" be returned, etc., should be read with the contract of employment executed therewith and secured thereby; and where it appears in the contract that the salesman was to travel in a foreign State, and the surety has notice of the acceptance of the bond, the surety on the bond is not entitled to have the samples delivered to him.—JENKINS v. PHILLIPS, Ind., 48 N. E. Rep. 657.

201. PROHIBITION—Courts—Jurisdiction.—Const. art. 6, § 2, giving the supreme court original jurisdiction in cases relating to the revenue, *mandamus* and *habeas corpus*, does not confer on that court original jurisdiction to issue a writ of prohibition.—PEOPLE v. CIRCUIT COURT OF COOK COUNTY, Ill., 48 N. E. Rep. 717.

202. PUBLIC LANDS — Boundaries — Mistake.—Where there is a manifest mistake in the calls of a patent, the plat and certificates of survey may be referred to for the purpose of determining the boundary.—PATRICK v. SPRADLIN, Ky., 42 S. W. Rep. 919.

203. QUIETING TITLE — Estoppel.—Where the owner of the property subject to a drainage assessment stands by and makes no objections to such improvements, which benefit his property, he may not deny the authority by which the improvements are made, or defeat the assessment made against his property for the benefit derived, whether the proceedings for the improvements are attacked for irregularity, or the validity is denied, but color of law exists for the proceedings.—BOARD COM'RS OF CASS COUNTY v. PLOTNER, Ind., 48 N. E. Rep. 635.

204. QUO WARRANTO — Sufficiency of Information.—The information in *quo warranto* proceedings by the State to oust a pretended corporation from the exercise of corporate franchises need not state reasons why it is invalid, but need only allege that such corporation is exercising them without lawful authority. —PEOPLE v. RECLAMATION DIST. NO. 136, Cal., 50 Pac. Rep. 1068.

205. RAILROAD COMPANIES—Abolition of Grade Crossings.—Under St. 1890, ch. 428, which provides a proceeding for the abolition of grade crossings, and does not attempt to define the extent to which alteration of the railroad may be carried, it is no objection to a report in such proceeding that it provides for extensive alterations of the road and a change in the location of a station.—IN RE SELECTMEN OF WESTBOROUGH, Mass., 48 N. E. Rep. 763.

206. RAILROAD COMPANY — Accident on Track — Contributory Negligence.—The mere fact that the dead body is found on the track between the tender and the switch engine, with the indication that two of the wheels had passed over the man, does not authorize the inference of neglect of the employees of the railroad company, causing the death.—BRYANT v. ILLINOIS CENT. R. CO., La., 22 South. Rep. 799.

207. RAILROAD COMPANY — Defective Crossings—Negligence.—While Rev. St. 1889, § 2609, in terms imposes an absolute and continuing duty on railroad companies in respect to maintaining crossings, no liability for injury occasioned by defects therein arises unless the company has had actual or constructive notice of the defects, and has failed, within a reasonable time thereafter, to repair them.—NIXON v. HANNIBAL & ST. J. R. CO., Mo., 42 S. W. Rep. 942.

208. RAILROAD COMPANY—Fires.—One owning property contiguous to a railroad only assumes the risk of accidental loss through fires not occasioned through negligence or willfulness on behalf of the company.—WABASH R. CO. v. MILLER, Ind., 48 N. E. Rep. 663.

209. RAILROAD COMPANY — Killing Stock.—A railroad company is not relieved from liability for killing stock not belonging to the adjacent owner on its right of way by permitting the adjacent owner to put up any such fence or bars as he may choose, since the statute requiring railroad companies to fence was adopted, not alone as a protection to the property of adjacent owners, but also as a protection to employees and passengers on the train.—NEVERSORRY v. DULUTH, ETC. RY. CO., Mich., 73 N. W. Rep. 125.

210. RAILROAD COMPANY—Negligence.—Where no signals were given before reaching a crossing, and the view of the tracks was obstructed, the fact that a traveler did not stop to look or listen does not cast on him the burden of proving absence of contributory negligence.—DALWIGH v. INTERNATIONAL, ETC. R. CO., Tex., 42 S. W. Rep. 1009.

211. RAILROAD COMPANY—Negligence—Rate of Speed.—Under Hurd's Rev. St. 1893, ch. 114, § 87, making a railroad company "liable to the person aggrieved for all damages done to the person or property by (a) train, locomotive, engine, or car," resulting from its going at a greater rate of speed than allowed by a city ordinance, the company is liable for the frightening of horses by a train going faster than is allowed by ordinance, though no actual collision occurs.—ILLINOIS CENT. R. CO. v. CRAWFORD, Ill., 48 N. E. Rep. 679.

212. RAILROAD COMPANY — Street Railroads — Negligence.—Where a street-railway company erects a temporary sidewalk over a flooded street, for the use of its passengers in going from one car to another, it is not bound to construct the passage-way in a manner as reasonably safe "as possible."—FINSETH v. SUBURBAN RY. CO., Oreg., 51 Pac. Rep. 84.

213. RAILROAD COMPANY—Street Railroads — License Fees.—A street-car corporation accepting a franchise, which requires the payment of certain license fees, is bound to pay such fees, though other corporations operating cars in the same city are required to pay less fees.—BYRNE v. CHICAGO GEN. RY. CO., Ill., 48 N. E. Rep. 703.

214. RAILROAD COMPANY — Street Railroads — Negligence.—The motoneer of an electric car has the right to assume that a person on the track in front of an approaching car will get out of its way, and he need not check its speed until he has good reason to believe that such person is paying no heed to the customary signals.—LYONS v. BAY CITIES CONSOL. RY. CO., Mich., 73 N. W. Rep. 139.

215. RAILROAD COMPANY—Street Railroads — Receivers.—Where a city has the power to enforce forfeiture of a street-railway company's franchise for failure to pay a tax, and the company confesses its inability to pay such tax, and the mortgagee of the company stands ready to advance the necessary funds in case a receiver be appointed with power to borrow money, the appointment of a receiver upon the prayer of the mortgagee is proper, not as foreclosing the mortgage, and giving the mortgagee possession before the redemption period has expired, but as a means of preserving the property for the benefit of all concerned.—UNION ST. RY. CO. OF SAGINAW v. CITY OF SAGINAW, Mich., 73 N. W. Rep. 243.

216. REPLEVIN—Title to Maintain.—A wife cannot recover, in replevin, bonds purchased by her husband with funds which came from plaintiff's father, as she had no legal title, and was not entitled to immediate possession.—LEETE v. STATE BANK OF ST. LOUIS, Mo., 42 S. W. Rep. 927.

217. RES JUDICATA—Claim against County.—A county board, in examining the reports and adjusting the accounts of a county officer, acts ministerially, and an adjustment so made is no bar to an action subsequently brought to recover moneys unlawfully withheld by the officer; but such a board, in auditing and allowing claims under the power conferred by Comp. St. ch. 18, art. 1, § 37, acts judicially, and its judgment is conclusive, unless reversed in appellate proceedings.—TRITES v. HITCHCOCK COUNTY, Neb., 73 N. W. Rep. 215.

218. RES JUDICATA — Personal Contract.—Judgment against a licensee of a patent for two years' royalty, with adjudication that he was liable, though he made and sold no goods under the patent, and that the privilege given the licensor to cancel the contract on certain conditions did not make it an option contract, and therefore void, does not bar the defense, in an action against the licensee's executors for royalties subsequent to his death, that the contract was a personal one, determined by his death.—SMITH v. PRESTON, Ill., 48 N. E. Rep. 688.

219. SALES—Actionable Deceit.—Where the owner of a corporate bond, knowing it to be false, though without a corrupt intent, represented to a prospective buyer of the bond that the obligation was secured by machinery and realty of the corporation of a certain value, and the buyer purchased in reliance on the statement, there was actionable deceit.—WHITING v. PRICE, Mass., 48 N. E. Rep. 772.

220. SALE—Change of Possession—Delivery.—Where L sold a quantity of wheat to H and M on September 8, 1895,—no delivery thereof having been made, nor any change of possession,—and on the 23d of the same month defendant levied an execution against L upon said wheat, held, that the sale to H and M was void, as to creditors, under the provisions of section 3021, Rev. St. Idaho.—HALLETT v. PARRISH, Idaho, 51 Pac. Rep. 109.

221. SALES—Fraud of Buyer—Silence.—Evidence that a buyer was utterly insolvent; that he ordered and received lumber on his own account, but in the name of a firm, which was composed of two partners besides himself, both financially responsible, and was rated as solvent by the reports of a leading mercantile agency; that the buyer knew of such rating and of the reliance usually placed on such reports; and that the sellers, who were subscribers to said reports, relied on the report as to the firm,—shows fraud, though the buyer made no direct misrepresentations.—FRISBEE v. CHICKERING, Mich., 73 N. W. Rep. 112.

222. SALE — Immediate Delivery.—Civ. Code, § 3440, declaring fraudulent a transfer of personal property "made by a person having at the time the possession or control" thereof, and not accompanied by immediate delivery, etc., does not apply to a sale of property attached by the sheriff, made after the seller has compromised with the attachment plaintiffs, but before the attachment is released, where delivery is made after the release.—WILLIAMS v. BORGWARDT, Cal., 51 Pac. Rep. 15.

223. SALE—Implied Warranty.—Upon a sale of a domestic animal to a retail butcher, engaged in the business of slaughtering such animals and selling their flesh to his customers for their immediate use as food, there is no implied warranty that the animal is fit for food, although the vendor knows the purpose for which the butcher bought it.— HANSON v. HARTSE, Minn., 73 N. W. Rep. 163.

224. SALES—Insurable Interest of Buyer before Delivery.—A buyer of goods, title to which is to remain in the seller until delivery, has an insurable interest in the goods before delivery.— BOHN MANUFG. CO. v. SAWYER, Mass., 48 N. E. Rep. 620.

225. SALE—Rescission for Fraud. — Where the purchaser of goods seeks to avoid the contract of purchase on the ground of fraud, he must, upon the discovery of the facts constituting the fraud, at once announce his purpose to rescind, adhere to it, and make or offer to make restitution. If he remain silent, retain possession of the goods received under the contract as his own, without complaint, until long after the discovery of the fraud, he will be held to have waived his objection, and will be bound for the purchase price, as though no fraud had occurred.—SMITH v. ESTEY ORGAN CO., Ga., 28 S. E. Rep. 292.

226. SALE—Severable Contracts.—A contract for the sale of several articles which affixes a price upon each is severable as to each article contracted for, where there is nothing to show that the sale of one item is contingent upon the sale of the others.—HERZOG v. PURDY, Cal., 51 Pac. Rep. 27.

227. SEDUCTION—Nonaccess of Husband—Evidence.—When plaintiff, who was married in April and gave birth to a child in September, sued the defendant for seducing her, she will not be allowed to testify to any state of facts tending to prove that she did not have, or could not have had, sexual intercourse with her husband until February of the year she was married, as such testimony would tend to bastardize her child born in wedlock, and is against public policy.—RABEKE v. BAER, Mich., 78 N. W. Rep. 242.

228. SHERIFF—Fees in Advance.—In the absence of an express statute to that effect, a sheriff cannot demand payment of his fees before serving a summons issued to him from another county.—MCFARLAN v. STATE, Ind., 48 N. E. Rep. 625.

229. SPECIFIC PERFORMANCE.—In a suit for specific performance of an oral agreement not to sue plaintiff, it is competent to show, by the attorney who acted for the defendant, in making the agreement, what were the statements and promises which the defendant authorized him to communicate, and which he did communicate, to the plaintiff, in the negotiation of the agreement.—BOMEISLER v. FORSTER, N. Y., 48 N. E. Rep. 534.

230. SPECIFIC PERFORMANCE—Contracts — Mutuality.—Specific performance of a contract to convey land in consideration of services to be performed will not be denied the vendee on the ground of want of mutuality, where he has substantially performed his part of the contract.—THURBER v. MEYES, Cal., 50 Pac. Rep. 1063.

231. STOCKS—Conversion—Deceit.—Where one of two persons owning a certificate of stock sold and indorsed it to a third person on his false representations as to its value, the other denying and proving want of authority in the first person to sell his interest, and not affirming the transaction, but asserting the title in himself, cannot maintain an action of deceit against the third person on account thereof.—MOYNAHAN v. PRENTISS, Colo., 51 Pac. Rep. 94.

232. SPECIFIC PERFORMANCE—When Maintainable.—A purchaser to whom the identical property for which he bargained was delivered cannot, though induced to purchase solely by means of a false and fraudulent representation by the seller that the thing sold had certain qualities, which it had not, maintain an equitable petition for "specific performance," and thus compel the seller to deliver to him another article of like kind, owned by the latter, and in fact having such qualities, but which the plaintiff had never purchased.—MILTIRONS v. DILLON, Ga., 28 S. E. Rep. 285.

233. TAXATION—Deeds.—Acts 1893, No. 206, § 61, empowers the auditor general to file proceedings for the sale of lands for delinquent taxes, and section 98 provides that the auditor general, upon finding that the tax has been paid to the proper officer within the time limited, even though a deed has been executed and delivered, shall give to the owner of the land a certificate of error: Held, that in an action of ejectment based on a tax deed, a recovery could be had where it appeared that the taxes had been paid prior to the sale of the land, and that the auditor general had issued a certificate of error in the tax deed.—WOOD v. BIGELOW, Mich., 78 N. W. Rep. 129.

234. TAXATION — Transfer Tax — Exemptions. — The provision, in section 2 of the transfer tax act of 1892, exempting from taxation a transfer to one to whom the decedent, grantor, donor or vendor has stood, for not less than 10 years, in the mutually acknowledged relation of a parent, is not confined to illegitimate children of the decedent, grantor, donor or vendor, but applies also to any person, infant or adult, though not of his blood nor legally adopted by him, to whom he has stood in *loco parentis*, receiving, in return, filial attention and service.—IN RE BEACH'S ESTATE, N. Y., 48 N. E. Rep. 516.

235. TAX SALES—Notice.—There is no authority for including in the redemption notice under tax sale the amount paid by the county for advertising the property for sale, nor the amount paid by the purchaser for a tax certificate. The notice should state "the amount of taxes charged, with interest."—CASNER v. GAHLMAN, Kan., 51 Pac. Rep. 56.

236. TELEGRAPH COMPANIES—Rules.—Where the receiver of a telegram is not shown to have assented thereto, he is not bound by a rule of the telegraph company, printed on the delivered dispatch, requiring all claims for damages to be presented within 60 days.—WEBBE v. WESTERN UNION TEL. CO., Ill., 48 N. E. Rep. 670.

237. TENANTS IN COMMON—Rights and Liabilities Inter Se.—The purchaser at foreclosure sale of the undivided interest of a tenant in common is entitled to enter and enjoy the premises on receiving his deed, and the cotenant cannot thereafter lawfully monopolize the use of the land directly or indirectly as against him.—MORELAND v. STRONG, Mich., 78 N. W. Rep. 140.

238. TENANTS IN COMMON—Conveyance.—A tenant in common in a building having a hall six feet wide running from front to rear, which is the only means of access to two offices, one on each side thereof, cannot erect a wall along the middle thereof, as against one owning without limitations an undivided interest in the property, though the latter person also owns an undivided interest in one of the offices by deed containing a limitation on the estate thereby granted which would, as against it, allow of such erection.—WOODS v. EARLY, Va., 28 S. E. Rep. 374.

239. TOWNS — Orders — Validity.—A town treasurer cannot bind the town by his acceptance of an illegal order.—GOODWIN v. TOWN OF EAST HARTFORD, Conn., 38 Atl. Rep. 877.

240. TOWNSHIP BONDS—Validity—Innocent Purchasers.—The question whether the petitioners for an issue of township bonds were freeholders of the township, as required by the statute, is one which cannot be questioned by the township, as against innocent holders of the bonds, after the same has been determined by the county board, the bonds issued, and the avails thereof received.—CHILTON v. TOWN OF GRATTON, U. S. C. C., D. (Neb.), 82 Fed. Rep. 873.

241. TRUSTS — Construction. — Where deceased bequeathed certain property in trust for his wife, who was to receive the net income thereof for life, and the estate was to be held by the trustees, so that neither the estate nor the income thereof should be liable for the debts or contracts of any future husband, or in any manner subject to his control, or be taken in execution or attachment or otherwise howsoever, "and so that she shall not pledge or anticipate said property or said net proceeds of income, or any part thereof," said net income was not subject to execution, attachment or garnishment in the hands of the trustees, for a debt of the wife. — REID v. SAFE DEPOSIT & TRUST CO. OF BALTIMORE, Md., 38 Atl. Rep. 899.

242. TRUST—Construction—Nature of Estate.—Where a husband and father, being about to die, delivered to his wife certain personal property, and instructed her to use it as she pleased, and raise his children, and educate them, and divide one-half of it among the children equally, the division to be made after the children were of age (no specified time), we cannot say, as a matter of law, that the district court erred, as against the beneficiaries of said trust, in holding that said beneficiaries were only entitled to a division of whatever was left of said property after the youngest child became of age.—BELLEVILLE v. MITCHELL, Kan., 51 Pac. Rep. 63.

243. TRUSTS—Findings.—Personal representatives of a son who sent money to his mother, without any hint of what he wanted done therewith, can charge her estate, on account thereof, only with the money she re-

ceived and the interest it earned while under her control; whatever trust existed having grown out of her conduct, and been assumed by her when she decided to keep her son's money separate from her own, and make it earn for him whatever she might have opportunity to make it earn.—BEALE v. KLINE, Penn., 38 Atl. Rep. 897.

244. TRUSTS—Undelivered Deed as Security.—Where the deed to certain land purchased by husband and wife, in the name of the wife, was, by agreement of the parties, deposited with plaintiff by the vendor as collateral security for the payment of certain money to be furnished by plaintiff for the purpose of building thereon, for which the wife executed her note to plaintiff, such transaction constituted a parol trust in plaintiff's favor, to the extent of the debt so incurred, subject to which the wife took title, and which equity will enforce, though the wife was not personally liable for the payment of such note.—FIRST NAT. BANK OF SALISBURY v. FRIES, N. Car., 28 S. E. Rep. 350.

245. USURY—Payment of Interest in Advance.—The mere fact that interest payments upon a loan maturing five years from date have been advanced so that a slightly greater rate of interest than that allowed by law is reserved or secured to the lender will not, of itself, support a finding that the loan was usurious, and that the contract was made with a corrupt intent to evade the law.—SWANSON v. REALIZATION & DEBENTURE CORP. OF SCOTLAND, Minn., 73 N. W. Rep. 165.

246. VENDOR'S LIEN—Enforcement.—Where a note recites that it is given for part of the price of land, and that it is secured by a vendor's lien, and the deed reciting the reservation of such lien is recorded, a purchaser of the note before maturity, without notice, is entitled to enforce such lien as against subsequent purchasers of the land, even though, as between the grantor and grantee, no such lien existed.—HOUGHTON v. ROGAN, Tex., 42 S. W. Rep. 1018.

247. VENDOR'S LIEN—Record—Notice.—One who purchases land for value is not bound by a vendor's lien thereon which was reserved by parol, where he had no notice thereof.—YANCEY v. BLAKEMORE, Va., 28 S. E. Rep. 336.

248. VENDOR AND PURCHASER — Defect in Title.—A party who, under the terms of an executory written contract, is conditionally entitled to receive a good title to real property, upon its being made certain that the other party cannot make such title, may recover such payments as he has meantime made pursuant to the terms of the contract to which he is a party.—MAXWELL v. GREGORY, Neb., 73 N. W. Rep. 220.

249. VENDOR AND PURCHASER—Forfeiture for Default.—Where the vendor in the contract for the sale of real property is required by the terms thereof to give written notice to the vendee of his election to treat the contract as terminated on failure of the vendee to pay at the time specified therein, time being declared to be of the essence of the agreement, such vendor must act with diligence in giving such notice, or he will be deemed to have waived his right to insist that the vendee has lost his rights in equity on account of such breach. Under the facts of this case, the vendor is held to have waived his rights to insist upon a termination of the contract by waiting for three months before giving the notice.—FARGUSSON v. TALCOTT, N. Dak., 73 N. W. Rep. 207.

250. VENDOR AND PURCHASER—Vendor's Lien.—Where the several owners of different mining claims join in a contract for the sale of all the claims for a sum *in solido*, payable to them jointly, and the several deeds are executed, and possession taken thereunder, in pursuance of the contract, they jointly have a vendors' lien on all the property conveyed, for the unpaid purchase money.—BRISCO v. MINAH CONSOL. MIN. CO., U. S. C. C., D. (Mont.), 82 Fed. Rep. 952.

251. WATERS—Stream—Pollution.—The pollution, by a properly constructed city sewer, of a stream which is the natural drainage of the land on which the city is built, gives no right of action to a lower riparian owner, whose mill property, constructed and operated before the building of the city, is injured thereby.—CITY OF RICHMOND v. TEST, Ind., 48 N. E. Rep. 610.

252. WILLS — Annuities — Commencement.—Testator bequeathed a portion of his estate in trust for his widow, the trustees to hold and manage the same for seven years after his death, and to pay the widow $7,500 "each year for the following seven years" in semi-annual installments, "the first as soon after my decease as sufficient funds for the purpose shall come into their possession, and the remaining ones at the end of every six months afterwards:" Held that, in view of the evident intention of testator and of Civ. Code, § 1368, providing that annuities commence at testator's decease, the annuity should begin at the date of testator's decease.—CREW v. PRATT, Cal., 51 Pac. Rep. 44.

253. WILLS—Charities—Validity.—A provision, in a will bequeathing legacies to various societies and institutions, that if any such society, for want of incorporation or any other cause, is unable to take the legacy bequeathed to it, the same is given "absolutely" to the person who shall be the chief executive officer of the society, "to be by him applied to the uses and purposes of such society," is void; since, notwithstanding the direction that the officer shall take "absolutely," it creates a trust within the condemnation of the statute against the unlawful suspension of the ownership of personal property, and also amounts to a bequest to societies unincorporated or otherwise incapable of taking.—FAIRCHILD v. EDSON, N. Y., 48 N. E. Rep. 541.

254. WILLS—Construction—Bequest to "Heirs."—A bequest to the heirs of testator's niece, who died before testator, is a class gift, which, on his death, vests in her descendants who were then living *per stirpes;* the word "heirs" being used in its primary legal sense, and not to denote those who would succeed to her personal estate under the statute of distributions.—HUGGLES v. RANDALL, Conn., 38 Atl. Rep. 886.

255. WILLS—Nature of Estates Created.—A devisee surviving the testator takes a fee in land under a will devising it on the condition that, should the devisee "die without issue," the land would go to another.—LAWLOR v. HOLOHAN, Conn., 38 Atl. Rep. 903.

256. WILLS—Perpetuities.—Where land is devised to 17 persons for life, with six life estates in remainder, all but one of which will vest during the lives of said 17 persons, and the remaining one within 21 years after the death of a person alive at the testator's death, the devises are not void as creating a perpetuity.—MASSON v. LARMON, Ill., 48 N. E. Rep. 556.

257. WILL — Perpetuties — Suspension of Power of Alienation. — A devise in trust to hold, manage, and pay to named persons specific sums annually for seven years, and then sell and distribute as therein directed, was void, as creating perpetuities, in violation of Civ. Code, §§ 715, 716, providing that the absolute power of alienation shall not be suspended longer than during the continuance of lives in being at the creation of the limitation, and that every future interest is void which, by any possibility, may suspend such power of alienation for a longer period. — CREW v. PRATT, Cal., 51 Pac. Rep. 38.

258. WILLS—Trusts—Perpetuities.—An estate vested by will in certain trustees for a charitable use will be sustained, though there is annexed to it a trust for accumulation, which is void, as being a violation of the rule against perpetuities.—INGRAHAM v. INGRAHAM, Ill., 48 N. E. Rep. 561.

259. WITNESSES — Transactions with Decedents.—Where a person negotiated with one of two tenants in common for certain real estate, the other cotenant was not incompetent as a witness to testify as to transactions between himself and his cotenant because of the death of the purchaser, who was not present at the time of the transactions between the cotenants.—SCHMITZ v. BEALS, Mich., 73 N. W. Rep. 109.